

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*SZGRK v MINISTER FOR IMMIGRATION & ANOR* [2008] FMCA 147

MIGRATION – Review of RRT decision – where Tribunal made findings about general persecution – whether Tribunal failed to consider an integer of the applicant’s claim – whether Tribunal asked the right questions in relation to applicant’s relocation – whether Tribunal failed to consider whether need for familial contact would prevent applicant from relocating.

*Migration Act 1958, s.91R(1)(b)*

*Sellamuthu v Minister for Immigration* (1999) 58 ALD 30

*SZATV v Minister for Immigration* [2007] HCA 40

*NAIZ v Minister for Immigration* [2005] FCAFC 37

Applicant:	SZGRK
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 2977 of 2006
Judgment of:	Raphael FM
Hearing date:	11 February 2008
Date of last submission:	11 February 2008
Delivered at:	Sydney
Delivered on:	18 February 2008

## **REPRESENTATION**

Counsel for the Applicant: Mr C. Lenehan

Solicitors for the Applicant: D'Ambra Murphy Lawyers

Solicitors for the Respondent: DLA Phillips Fox

## **ORDERS**

- (1) A writ of certiorari issue removing into this Court to be quashed the purported decision of the second respondent.
- (2) A declaration that the second respondent's decision made on 27 August 2006 and handed down on 19 September 2006 is void and of no effect.
- (3) A writ of mandamus be directed to the second respondent directing it to reconsider and determine the matter according to law.
- (4) A writ of prohibition be directed to the first respondent preventing him or his agents or delegates from acting upon or giving effect to the second respondent's purported decision.
- (5) The first respondent pay the applicant's costs assessed in the sum of \$5,000.00.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
SYDNEY**

**SYG 2977 of 2006**

**SZGRK**  
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**  
First Respondent

**REFUGEE REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

1. This is the second review of a decision made by the Refugee Review Tribunal in respect of this applicant, who arrived in Australia in June 2004 from Bangladesh. The applicant applied for a protection (class XA) visa on 21 July 2004. On 8 February 2005 a delegate of the Minister refused his application and the applicant sought review of that decision from the Refugee Review Tribunal. On 24 May 2005 the Tribunal affirmed the decision under review, but the Tribunal's decision was quashed by order of the Federal Magistrates Court on 7 June 2006. On 21 August 2006 the Tribunal differently constituted held a hearing which the applicant attended. On 27 August 2006 the Tribunal determined to affirm the decision not to grant a protection visa. The applicant sought review of that decision from this court and at the hearing on 11 February 2008 filed a second Further Amended Application.
2. The grounds upon which the applicant sought the protection of Australia can be found in a statutory declaration made by him with his original protection visa application [CB 50]-[55], augmented by letter

of 10 April 2005 to the RRT [CB 102]-[106], and in a further letter to the Tribunal dated 8 August 2006 [CB 228]-[235]. In short, the applicant claims that he was a member of the Buddhist community in Bangladesh, born in March 1978. On 25 February 1993 his father was killed whilst attending a religious festival in his village. The applicant claimed the killers were BNP thugs who then proceeded to steal the family property, including his home. The applicant thereafter was educated in an orphanage and became a Buddhist monk. On completion of his studies in 2001 he returned to his locality to be involved in religious activities [CB 52]-[53]:

*The local BNP and fundamentalist leaders started to act against my activities. They realised that in the name of religious activities I have come to claim my paternal properties. They misunderstood me and started to plot against me. They threatened me to stop all my activities in my area. I was being persecuted in every sphere of my life. My life became under threat. I became under the attention of fundamentalist Muslim thugs and one day I was physically tortured. They warned me to leave my area and not to come back in the future.*

...

*I was assaulted twice by the unidentified person prior to leave [sic] Bangladesh for India on 14 March 2002”.*

The applicant then went to India where he lived in a Buddhist temple in Delhi. When the monks discovered that there was to be a crackdown on illegal immigrants they arranged for the applicant to obtain an Indian passport and a visitor’s visa to Thailand. The applicant entered Thailand and returned to India on 5 January 2003 but returned to Thailand in April 2003. On 10 June 2004, having obtained an Australian visitor’s visa, he travelled into this country.

3. It is important, for the purposes of these proceedings, that the manner in which the applicant made his claims is set out. In his statutory declaration of 21 July 2004 he states at paragraph 14 [CB 53]:

*“On my return back to Bangladesh I will have real chance of being persecuted because of my profile as religious activists and also the local leaders with [sic] realise that I shall try to recover my properties from them. My life will be under threat. There is no safety and security of life in Bangladesh for person like me.”*

And at [CB 54]:

*“Our constituency is a stronghold of fundamentalist Muslims led by renowned BNP leader Mr Salauddin Kader Chowdhury, who is advisor to Prime Minister Khaleda Zia.*

*He has a history of killing many Buddhists and Hindus during the liberation of Bangladesh. He is very powerful. The fundamentalist groups always believe that the minorities always vote for Awami League. Prior to October 2001 election the minorities were threatened not to vote for Awami League in our area. Mr Chowdhury contested against Awami League from this constituency. He won the election but it is believed that the minorities did not vote for him. As a result the oppression on minorities increased tremendously. They are harassed and tortured everywhere. They cannot live a normal life there. I was one of the victims. Under the circumstances it is not possible for me to go back to Bangladesh for the cause of my safety.”*

In the letter to the Tribunal dated 10 April 2005 the applicant stated at [CB 103]:

*“I was a Buddhist monk prior to my departure from Bangladesh. I became at [sic] the attention of fundamentalist Muslims and thugs of BNP for my religious activities. I was targeted by the authority prior to my departure from Bangladesh. I do not feel safe to go back to my country of origin. I might be targeted by the thugs of current fundamentalist coalition government if I go back. Many of my peer minority activists including my family members have already been harassed and physically intimidated.*

...

*The Buddhists are targeted by the members of RAB [Rapid Action Battalion] at the instruction of the government as they believe that minorities are the supporter of Awami League. People who are arrested they are mercilessly tortured both physically and psychologically and also killed by those forces. These killings are branded as the killings in cross fire. I firmly believe that it is not safe for me to go back to Bangladesh under these circumstances and I shall be the victim of persecution for my religious belief.”*

In the letter of 8 August 2006 to the Tribunal the applicant states at [CB 229]:

*“I wish to indicate that I have made specific claims of systematic harassments due to my religious belief prior to my departure from Bangladesh. I have also claimed my fear of persecution is related as a member of minority community that I have been experiencing in Bangladesh ...*

*The current law and order situation of Bangladesh and the government’s anti minority attitude will be harmful to me returning to Bangladesh. BNP, the archrival of minority communities is in power now. They have been trying to persecute the leaders and activists of minority community. The religious activists including myself will be the victim of harassment if they are in the government”.*

4. The Tribunal accepted that the applicant’s father was killed in 1993 and that he and his younger brother were sent to an orphanage in Dhaka. It accepted that the applicant is a Buddhist and that he became a Buddhist

monk in 1998. It accepted that after the applicant completed his religious training he returned to his village where he lived in the temple. It accepted that in February 2002 a group of Muslim people, including people whom the applicant believed to be the sons of the people who had killed his father, threatened to kill the applicant if he did not leave the village [CB 261]:

*“The Applicant has suggested that these threats had to do with his religious activities as a Buddhist monk or a local religious leader but it appears they had more to do with the fears of this group of people that he would attempt to recover his father’s land or that he would attempt to avenge his father’s death.*

*Whatever the motivation of the people who threatened the Applicant he does not suggest that they wanted him to do anything other than leave the village. He did so and he does not suggest that he or any other member of his family has since been threatened by these people. It is true that the Applicant claims he left Bangladesh precipitately but I do not accept on the evidence before me that there was or is an objective basis for any subjective fear the Applicant may have held then, or may hold now.”*

The Tribunal then made findings about general persecution of Buddhists in Bangladesh and found on the basis of independent country information that whilst there was some discrimination against religious minorities in areas such as access to government jobs, there was no general discrimination on the ground of religion [CB 262]:

*“ ... there was no evidence of organised systematic persecution of minorities by fundamentalist Muslim groups.”*

5. At [CB 262] the Tribunal said:

*“The Applicant said that there were some incidents which happened inside the villages which were not reported in the newspapers. However I do not accept that he will have to return to his village if he does not wish to do so. The Applicant is not presently living as a monk but he said at the hearing before me that it would be his wish to become a monk again if he returned to Bangladesh although because he had resigned from being a monk there would be a lot of formalities involved. As I put to the Applicant, I do not accept on the evidence before me that there is a real chance that his enemies in his village will be motivated to seek him out wherever he moves in Bangladesh. I consider that he will be able to live safely as a monk in a Buddhist monastery in some part of Bangladesh other than his village. I do not accept on the evidence before me that Buddhists, or Buddhist monks in particular, are persecuted for reasons of their religion in Bangladesh. I do not accept that there is a real chance that the Applicant will be persecuted by the Government of Bangladesh, the BNP, fundamentalists, Muslims or the sons of the people who killed his father, whether for reasons of his religion, his membership of the particular social group constituted by Buddhist monks or his membership of the particular social group*

*constituted by his family (by reason of the connection with his father), if he returns to Bangladesh now or in the reasonably foreseeable future.”*

The Tribunal then made a finding that if the applicant was unable to return to Bangladesh as a monk, he could find alternative employment and that the discrimination that might exist against Buddhists would not be sufficient in this field to come within the terms of s.91R(1)(b) of the *Migration Act 1958* [CB 262-263]:

*“For reasons given above, I do not accept that, if the Applicant is unable to resume his vocation as a Buddhist monk, there is a real chance that he will be persecuted by the Government of Bangladesh, the BNP, fundamentalists,, Muslims, or the sons of the people who killed his father, for reasons of his religion, his past membership of the particular social group constituted by Buddhist monks or his membership of the particular social group constituted by his family (by reason of the connection with his father) if he returns to Bangladesh now or in the reasonably foreseeable future.”*

6. The applicant put forward a two-pronged attack upon the Tribunal’s decision. He argued that when considering the question of relocation the Tribunal did not ask itself whether it was reasonable in the circumstances to expect that he would be able to relocate to another part of Bangladesh. In particular, the Tribunal appears to have ignored the applicant’s claim that he would have to return to his village in order to keep in touch with his family and community. He also claimed that the Tribunal had failed to consider an integer of his claim, namely that as a member of a minority group, he might be the subject of persecution outside his home area by other persons such as the MP Mr Chowdhury because of his imputed political opinion of opposition to the BNP and favourable to the Awami League. This was another matter which would have to have been taken into consideration when weighing up whether or not it was reasonable for the applicant to relocate, but the Tribunal did not take it into account and thus there was a constructive failure to exercise its jurisdiction.
7. I am satisfied that the applicant’s claim for refugee status should be broken down into its constituent parts. First, there is a general claim of persecution on the grounds of his religion. On this, the Tribunal comes to a finding based upon the independent country information that whilst there is discrimination there does not appear to be persecution, and with regard to the one example there was of persecution raised by the applicant, the Tribunal satisfied itself that the state provided

adequate protection in that those persecutors were arrested and sentenced to death. Then there is the claim that if the applicant returned to his home town, he would be the subject of persecution from those persons who killed his father. The applicant claims that this is on the ground of his religion but the Tribunal accepts that even if this is not an accurate description of the ground, then an appropriate ground is his membership of a particular social group (his family). The Tribunal accepts the possible persecution and fear the applicant has articulated.

8. The third matter raised by the applicant under the heading “religion” is probably better understood as imputed political opinion. This is the claim that BNP powerbrokers like Mr Chowdhury might persecute active members of religious minorities because they would be seen as political opponents and supporters of the opposition. This claim can be found at [CB53], [CB54], [CB 103] and [CB 229], extracted at [3] of these reasons. I am unable to find that this particular claim has been addressed by the Tribunal, although its dismissal of the claim could be said to be contained in the extract from [CB 262] found at [5] of these reasons. However, nothing in the preceding lines of that paragraph indicates that it was a claim that was analysed by the Tribunal so that whilst it may have been dismissed in the words used, it would appear to have been dismissed without consideration. In this regard the applicant’s claims have much in common with those considered by the Full Court in *Sellamuthu v Minister for Immigration* (1999) 58 ALD 30 at [15] and [16], and in particular [19]:

“It follows that **all** of the substantial claims, and information in support of them, put forward by an applicant must be considered.”

9. It is, of course, the respondent’s case that even if the Tribunal fell into jurisdictional error in the way expressed, and as found, it matters not because of the finding that the applicant could relocate to another part of Bangladesh. But in order for that finding to become an independent ground for affirming the decision under review, the Tribunal must ask itself the appropriate questions in relation to relocation in the context of the claim. In other words, it must look at the reasonableness of relocating in circumstances where the applicant may be the subject of persecution for the imputed political opinion. The findings which the Tribunal made in relation to relocation had as their main constituent the fact that the local persecutors of the applicant would not bother him in



another part of Bangladesh. Assuming that the Tribunal included Mr Chowdhury in that group, then the applicant would be expected to relocate outside his constituency. But Mr Chowdhury cannot have been the only politician who would consider persecuting members of minorities because of their possible support for the Awami League. The Tribunal did not consider this possibility and so was unable to consider the possibility of exactly where the applicant might be safe. It seems to me that the Tribunal's views on relocation, given in the context of specific claims about specific incidents in a specific place, cannot hold for a more general and unexamined claim which, if it was accepted, might severely restrict the availability of an alternative safe location to which it would be reasonable for the applicant to relocate.

10. The applicant attacks the Tribunal's general finding on relocation on the ground that it did not fully address the claims of the applicant when considering whether or not it would be reasonable, in the sense of practicable, for the applicant to relocate. The applicant argues that the gravamen of the decision in *SZATV v Minister for Immigration* [2007] HCA 40 required the Tribunal to consider any obstacles to relocation put by the applicant arising from his particular circumstances, or from the possible impact upon him of any relocation. This applicant argues that the Tribunal did not do that because it ignored his statement that he needed to return to his home village in order to satisfy his need for familial contact. The applicant makes reference to the decision of the Full Court in *NAIZ v Minister for Immigration* [2005] FCAFC 37 which was a relocation case involving a Fijian woman whose daughter was in Australia. In regard to the importance of family networks, the applicant points to the views of Kirby J in *SZATV* at [81]:

“In some circumstances, having regard to the age of the applicant, the absence of family networks or other local support, the hypothesis of internal relocation may prove unreasonable. In each case, the personal circumstances of the applicant; the viability of the propounded place of internal relocation; and the support mechanisms available if an applicant has already been traumatised by actual or feared persecution, will need to be weighed in judging the realism of the hypothesis of internal relocation” (footnotes omitted).

11. Whilst I would not cavil with any of the authorities set out above, I do have some difficulty in finding that they are applicable in this particular case. It is axiomatic, if a person is forced to flee his home because he has a well-founded fear of persecution should he return

there, that he accepts that he cannot return. The very definition of a refugee as a person who

“ ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and who is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”

assumes that an applicant for asylum will not be returning home. How then, is his need to return to his home village, in order to maintain familial connections, relevant to this applicant's claim? He is not at home now. Any communication between the applicant in Australia and his relations in Bangladesh must naturally be harder from several thousand miles away than it might be from a few hundred miles away in a city such as Dhaka. How can it be said that the Tribunal fell into error by not considering, in relation to the question of relocation, the one thing that the applicant's claims indicated he was unwilling to do, return to his home? The Tribunal rightly did not consider the question of familial contact in the applicant's home village as preventing him from relocating, because the applicant had made it completely clear that he was too frightened to return. In those circumstances I cannot see what questions the Tribunal might relevantly ask in the light of authorities discussed, and I am unable to find that the Tribunal fell into error in this manner.

12. Having found that the Tribunal failed to consider the applicant's claims arising out of the imputed political opinion and having found that this failure followed through to the consideration of relocation in those circumstances, I would make those orders sought by the applicant in the second Further Amended Application. I would order that the first respondent pay the applicant's costs which I assess in the sum of \$5,000.00.

---

**I certify that the preceding twelve (12) paragraphs are a true copy of the reasons for judgment of Raphael FM**

Associate:

Date: 18 February 2008