FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZKRZ v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 112*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming political persecution in Congo – both delegate and the Tribunal deciding that the applicant could obtain protection in South Africa – no decision on the merits of the applicant's claims – concession of jurisdictional error – consideration of whether relief should be withheld in the exercise of discretion on account of delay in bringing the proceedings.

Migration Act 1958 (Cth), ss.36, 417, 477

Chen Shi Hai v Minister for Immigration [2000] HCA 19
Minister for Immigration v SZKKC (2007) 159 FCR 565
NAGV and NAGW of 2002 v Minister for Immigration (2005) 222 CLR 161
SZEEF v Minister for Immigration [2006] FMCA 661
SZKRZ v Minister for Immigration & Anor [2007] FMCA 961

Applicant:	SZKRZ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1684 of 2007
Judgment of:	Driver FM
Hearing date:	6 February 2008
Delivered at:	Sydney
Delivered on:	22 February 2008

REPRESENTATION

Counsel for the Applicant:	Ms G Wright
Solicitors for the Applicant:	Refugee Advice and Casework Service
Counsel for the Respondents:	Mr T Reilly
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The Court directs that the name of the applicant is not to appear on the transcript of proceedings.

(2) A writ of certiorari shall issue quashing the decision of the Refugee Review Tribunal handed down on 6 September 2000.

(3) A writ of mandamus shall issue requiring the Refugee Review Tribunal to reconsider the review application before it according to law.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1684 of 2007

SZKRZ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was handed down on 6 September 2000. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa.

2. I adopt with minor amendments as further background paragraphs 2 through to 13 of the applicant's written submissions filed on 14 January 2008.

3. The applicant is a citizen of the Congo[1]. He departed the Congo for South Africa in September 1996[2]. On 2 February 1998 the South African Government issued him with a "Certificate of Exemption"

[1] court book ("CB") 24
[2] CB 71.2

under the Aliens' Control Act 1991 for the period 21 October 1997 until 20 October 1999[3].

4. In 21 February 1999 the applicant departed South Africa for Australia[4]. On the same day the applicant arrived in Australia on a three month tourist visa.

5. On 6 April 1999 the applicant lodged an application for a protection visa[5]. In his application he outlined that he fears physical harm from the Congolese authorities then under the rule of Sassou-Nguesso, stemming from his father's political involvement[6].

6. On 20 May 1999, a delegate of the Minister refused the application,[7] concluding that the applicant had effective protection in South Africa.[8]

7. On 21 June 1999, the applicant lodged an application for review in the Tribunal.[9]

8. On 16 August 2000, the Tribunal affirmed the decision of the delegate not to grant a protection visa.[10] The decision was handed down on 6 September 2000. The Tribunal did not take a detailed account of the applicant's experiences in Congo or of his fears about returning there because it found that he had effective protection in South Africa.[11] The Tribunal contacted the South African Embassy and found that the applicant was entitled to renew his Certificate of Exemption and that he had a right to enter and reside there.[12]

9. Following the handing down of the Tribunal's decision, the applicant pursued further options in relation to his application for a protection visa. This action is outlined in an affidavit sworn by the applicant on 10 October 2007. The action comprised participation in the Muin and Lie class action and three requests to the then Minister pursuant to s.417 of the *Migration Act 1958* (Cth) ("the Migration Act").

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[3] CB 47
[4] CB 71.8, 74.5
[5] CB 1-26
[6] CB 17-18
[7] CB 29-34
[8] CB 33-34
[9] CB 35-38
[10] CB 63
[11] CB 71.3
[12] CB 75.6

10. On 28 May 2007 the applicant applied to this Court for review of the Tribunal's decision and, on 20 June 2007, I dismissed the application as incompetent, pursuant to s.477 of the Migration Act[13].

11. On 19 July 2007 the applicant appealed to the Federal Court of Australia. On 14 August 2007, the Federal Court made orders by consent setting aside the orders of this Court of 20 June 2007, and remitting the matter to this Court for determination according to law. Those consent orders were based upon the Full Federal Court decision in *Minister for Immigration v SZKKC* (2007) 159 FCR 565.

The Tribunal's decision

12. In its reasons for decision of 16 August 2000 the Tribunal provides a summary of the law on the Refugee's Convention. In that summary, the Tribunal states that Australia's protection obligations do not extend to a person who has effective protection in a third country. The Tribunal relevantly states:

> *The relevant principles are now effectively codified in the provisions of s.36(3), (4) and (5) of the Act, which came into effect on 16 December 1999, but those provisions do not apply to the present matter. This matter is therefore governed by the case law.*[14]

13. The Tribunal notes: "[t]he Tribunal said that it would not take a detailed account of his experiences in Congo and any fears he may have about returning there".[15] The reason given by the Tribunal for its decision not to do so was that the applicant was able to live in South Africa.[16] The Tribunal found that the applicant had been granted refugee status in South Africa and was a recognised refugee in that country and was entitled to return and reside there.[17]

14. The Tribunal made no findings about the applicant's substantive claims to refugee status.

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[13] *SZKRZ v Minister for Immigration & Anor* [2007] FMCA 961
[14] CB 67.4
[15] CB 71.3
[16] CB 71.3, 78.8
[17] CB 76

The application before the Court

15. The applicant relies upon an amended application filed on 16 January 2008. The grounds of that application are:

> *The Tribunal failed to apply the right law.*
>
> *Particulars*
>
> *The Tribunal found that Australia did not have protection obligations to the applicant because he had prior and effective protection in South Africa and as such, did not consider his claims against Congo.*
>
> *On 2 March 2005 the High Court handed down its decision in* NAGV v Minister for Immigration and Multicultural Affairs *(2005) 222 CLR 161 which held that despite the availability of a third country offering asylum, in common law Australia retains its protection obligations towards a person previously found to be a refugee under Art 1A of* Convention Relating to the Status of Refugees 1951.
>
> *The Tribunal misapplied the law by:*
>
> *(a) finding that the applicant had effective protection in South Africa and as such, not assessing his claims against Congo.*

Evidence

16. I have before me the court book filed on 17 August 2007. I also received, without objection, the applicant's affidavit filed on 10 October 2007. The applicant was cross-examined on that affidavit in relation to his actions between 2001 and the present. He stated that he had consulted two solicitors, Mr Adrian Joel and Mr Mark Cruice, in relation to the Tribunal decision between 2001 and 2007, prior to being referred to his present solicitors. He still claims to be a refugee and still wishes to have his claims assessed pursuant to the Convention by the Australian authorities.

Submissions

17. The Minister concedes that the Tribunal's decision is affected by jurisdictional error in the light of the High Court decision in *NAGV and*

NAGW of 2002 v Minister for Immigration (2005) 222 CLR 161. In particular, the Minister concedes that *NAGV* is indistinguishable and that the Tribunal erred in construing s.36(2) of the Migration Act, for the reasons given by the High Court in *NAGV*.

18. Nevertheless, the Minister submits that relief should be refused in the exercise of the Court's discretion because of the applicant's delay in bringing these proceedings. The submissions note that the application was originally filed on 28 May 2007, more than six years after the Tribunal decision. However, the Minister only relies on the passage of time since the decision of the High Court in *NAGV* in 2005.

19. The submissions note that the applicant made three requests to the Minister under s.417 of the Migration Act, the third of which was made following the decision in *NAGV*. Relevantly, the Minister submits as follows:

> *While the Applicant also made three requests under s 417 of the Act during this period, the better view is that such an application is not an explanation for delay: see* SZGGP v MIAC *[2007] FMCA 965 (Nicholls FM) at [74-87], where the cases are fully considered.*
>
> *On the current state of the evidence there is plainly "unwarranted delay" justifying the withholding of relief:* The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd *(1949) 78 CLR 389 at 400, cited with approval in* SZBYR v MIAC *(2007) 235 ALR 609 (HCA) at [28]*.
>
> *It follows that the Application should be dismissed with costs.*

20. The Minister's submissions also deal with additional relief sought by the applicant should the Court decide to withhold relief in the form of the constitutional writs of certiorari and mandamus in relation to the Tribunal decision.

21. The applicant's written submissions filed on 14 January 2008 have substantially been overtaken by the Minister's concession. The submissions in relation to ancillary relief sought by the applicant are not material, in the event that the Tribunal decision is quashed and the Tribunal is required to rehear the review application.

22. In relation to that exercise of the Court's discretion, the applicant filed supplementary submissions on 5 February 2008 which are relevantly as follows:

> *The applicant made three requests under s 417 of the Act.*
>
> *The first request was made on 6 October 2000, one month after the Tribunal decision was handed down. The Minister's response was sent on 12 January 2001 (see affidavit of* [the applicant] *sworn 10 October 2007, annexures A and B).*
>
> *The second request was made on 3 July 2003, shortly after the* Muin/Lie *class action, in which the applicant was represented, was resolved. The Minister's response was sent on 20 April 2005 (see annexures and F and G).*
>
> *The third request was made on 10 June 2005, approximately two months after* NAGV *was handed down. The request refers in detail to* NAGV. *The Minister's response was sent on 17 January 2007 (see annexures I and J).*
>
> *It is not in dispute that the common law principle of delay can form part of the discretionary basis for refusing relief sought by an applicant.*
>
> *It is also accepted that delay arising from a s 417 request does not of itself excuse delay in seeking judicial review.*
>
> *However the authorities recognise that the making of a s.417 application is not something that cannot be taken into account as an explanation for delay:* SZGGP v MIAC *[2007] FMCA 965 at [80] …*
>
> *The relevant question is whether the making of an application under s 417 indicates that the applicant had implicitly accepted the Tribunal's decision and would not challenge it (see* SZGGP *at [78];* SZEEF v MIMIA *[2006] FMCA 661 at [102] referring to* Das v MIMIA *[2004] FCA 489 at [11];* M211 of 2003 v MIMIA *(2004) 212 ALR 520 at [23]-[24]).*
>
> *In the applicant's submission, none of the requests made under s 417 can be seen as inconsistent with the application for relief or as an indication that the applicant had made a conscious decision to abandon the route of seeking to review the Tribunal's decision. At the time the applicant made the first two requests under s 417, the applicant acted on a perceived, settled state of the law. At that time, the applicant's prospects of success on an application*

for judicial review were nil. The law was restated in a different way in NAGV *in March 2005. The applicant then sought promptly to vindicate his rights in accordance with the law as stated in* NAGV *by pursuing the only avenue of relief then available to him, that being a request under s 417 of the Act in which he drew the Minister's attention to* NAGV.

The requests made under s. 417 of the Act (particularly the request made promptly after NAGV *had clarified the law as to safe third countries) should be seen as a clear indication that the applicant was unwilling to accept the Tribunal's decision as the final resolution of his rights.*

Further, in any event, in the present case, it is submitted that there are exceptional circumstances justifying the grant of relief, consisting of the nature and consequences of the jurisdictional error relied upon. The jurisdictional error established entails a total failure to consider the applicant's claims to refugee status. The failure to do so "goes to the heart of the decision-making process".

In the applicant's submission, in the particular circumstances of this case, there is no unwarranted delay such as to justify this Court refusing relief. Accordingly, the application should be remitted to the Tribunal for redetermination according to law.

Reasoning

23. The decisions of this Court and of the Federal Court on the question of whether a request to the Minister to intervene, pursuant to s.417 of the Migration Act, provides a sufficient explanation for delay in bringing court proceedings are inconsistent. The applicant correctly points out that some of the authorities relied upon by the Minister have involved questions of extending time for proceedings to be brought, rather than the withholding of relief in the form of constitutional writs once jurisdictional error has been identified. A question exercising the minds of both this Court and the Federal Court in many of these cases is whether the making of a request to the Minister pursuant to s.417 involves an acceptance of the validity of the relevant Tribunal decision[18]. Whatever the general position may be, on the facts of this matter, the third approach made to the Minister, pursuant to s.417, did

[18] There is a useful discussion of the authorities by Barnes FM in *SZEEF v Minister for Immigration* [2006] FMCA 661 at [96]-[111]

not involve such an acceptance. That was the only request in the period of time relied upon by the Minister. That request was made in writing by the applicant's solicitor, Mr Cruice, by letter dated 10 June 2005. The letter discusses in detail the Tribunal's decision and the apparent impact of the then recent decision of the High Court in *NAGV*. While the letter also dealt with asserted exceptional circumstances, the letter was an invitation to the Minister to intervene to deal with an apparently invalid Tribunal decision, not an approach to the Minister to substitute a more favourable decision for a valid decision of the Tribunal. Minister Vanstone responded on 17 January 2007 advising that she had decided not to exercise her discretion in favour of the applicant.

24. In my view, there are compelling reasons why the Court should not withhold relief in the form of the constitutional writs of certiorari and mandamus. In the first place, jurisdictional error is conceded. In the second place, the applicant has, quite appropriately in my view, promptly invited the Minister to deal with that invalidity in the form of a request pursuant to s.417. It was the Minister's refusal to exercise her discretion that obliged the applicant to bring this present proceeding. It is true that the proceeding could have been instituted more promptly than it was following the letter from Minister Vanstone. However, that delay of only six months does not detract from the need for the applicant's protection visa claims to be dealt with according to law.

25. That brings me to the third and probably more important point. The fact is that Australia's protection obligations to this applicant have never been considered in any meaningful sense. That consideration was avoided, both by the delegate and by the Tribunal, by virtue of the decision that the applicant enjoyed rights of protection in South Africa. Two Ministers refused to consider the applicant's case. The third stated that she had considered it, but her reasons for refusing to intervene are not known. The applicant has now been in this country for many years and has established a family here. That simply underscores the necessity for Australia's protection obligations to him to be assessed. That is all the applicant seeks. That is all that he is entitled to expect. A lawful exercise of power by the Tribunal will ensure that the applicant receives what he is entitled to expect. It is well to bear in

mind the dictum of Kirby J in *Chen Shi Hai v Minister for Immigration* [2000] HCA 19 at [47]:

> *Whilst courts of law, tribunals and officials must uphold the law, they must approach the meaning of the law relating to refugees with its humanitarian purpose in mind. The Convention was adopted by the international community, and passed into Australian domestic law, to prevent the repetition of the affronts to humanity that occurred in the middle of the twentieth century and earlier. At that time Australia, like most other like countries, substantially closed its doors against refugees. The Convention and the municipal law giving it effect, are designed to ensure that this mistake is not repeated.*

26. The applicant should receive relief in the form of the constitutional writs of certiorari and mandamus and I will make orders to that effect.

27. I will hear the parties as to costs.

I certify that the preceding twenty-seven (27) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 22 February 2008