FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZDJZ v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 310

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of decision of Refugee Review Tribunal affirming decision not to grant protection visa – national of Afghanistan – multiple reasons for well-founded fear of persecution – whether Tribunal failed to consider whether there might be a Convention reason for extortion in addition to a non-Convention reason – jurisdictional error.

Migration Act 1958 (Cth), ss.424A, 474

Sellamuthu v Minister for Immigration & Multicultural Affairs (1990) 90 FCR 287 referred to.
Minister for Immigration & Multicultural Affairs v Sameh [2000] FCA 578 referred to.
NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) [2004] FCAFC 263 referred to.
NBGV v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 690 referred to.
Applicant S v Minister for Immigration and Multicultural Affairs (2004) 217 CLR 387 referred to.

Applicant:	SZDJZ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1208 of 2004
Judgment of:	Scarlett FM
Hearing date:	16 November 2006
Date of Last Submission:	16 November 2006
Delivered at:	Sydney
Delivered on:	21 March 2007

REPRESENTATION

Counsel for the Applicant:	Mr Karp
Solicitors for the Applicant:	Legal Aid Commission of NSW
Counsel for the Respondent:	Mr Johnson
Solicitors for the Respondent:	Sparke Helmore

ORDERS

(1) That there be an order in the nature of certiorari directed to the Second Respondent, quashing the decision of the Second Respondent handed down on 30 March 2004.

(2) That there be an order in the nature of mandamus requiring the Second Respondent to reconsider and redetermine the Applicant's application for a Protection visa according to law.

(3) That there be an order in the nature of prohibition restraining the First Respondent and his servants and agents from acting upon or giving effect to the decision of the Second Respondent handed down on 30 March 2004.

(4) That the First Respondent pay the Applicant's costs fixed in the sum of $5,000.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1208 of 2004

SZDJZ
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. This is an application for review of a decision of the Refugee Review Tribunal made on 9th March 2004 and handed down on 30th March 2004. The Tribunal affirmed a decision of the delegate of the Minister not to grant the Applicant a protection visa.

2. The Applicant, by means of a Further Amended Application that was filed in court on the day of the hearing, seeks orders in the nature of certiorari, mandamus and prohibition.

Background

3. The Applicant is a citizen of Afghanistan who arrived in Australia on 3rd September 1999. He was granted a Subclass 785 (Temporary Protection) visa on 27th January 2000. The Applicant applied for a

further protection visa on 2nd February 2000. A delegate of the Minister refused this application on 19th August 2003.

4. On 15th September 2003 the Applicant applied to the Refugee Review Tribunal for a review of the delegate's decision. The Tribunal wrote to the Applicant and invited him to attend a hearing on 30th January 2004. The Applicant attended the hearing and gave oral evidence.

5. The Applicant told the Tribunal that he would be at risk of harm if he were to return to Afghanistan because he is a Hazara and because of the political and cultural situation in that country. He said that he remained at risk from the Taliban because he is a Hazara and a Shia.

The Tribunal decision

6. The Refugee Review Tribunal handed down its decision on 30th March 2004. A copy of the Tribunal decision and reasons for that decision can be found on pages 170 to 192 of the Court Book. The Tribunal's findings and reasons are set out on pages 185 to 192.

7. The Tribunal noted that the Applicant was recognised as a refugee in January 2000 on the basis of circumstances then prevailing in Afghanistan and that, for the purposes of the Refugees Convention, he remained a refugee in relation to those circumstances unless one of the cessation clauses in Article 1C applied, in this case, Article 1C(5). The Tribunal stated:

> *The Tribunal has therefore considered whether, in accordance with Article 1C(5) of the Convention, the Applicant can no longer continue to refuse to avail himself of the protection of his country of nationality because the circumstances in connection with which he was recognised as a refugee have ceased to exist.*
>
> *The circumstances in connection with which the Applicant was originally recognised as a refugee in 2000 were essentially that the Applicant would be persecuted in Afghanistan by the Taliban authorities because he is an Hazara and a Shia Muslim and that as a Sayed – an elite group of Hazara – he would be more likely to be persecuted by the Taliban than other Hazara.*

> *However, independent advice cited above, which the Tribunal accepts, indicates that the Taliban were removed from power in Afghanistan by mid-November 2001.*[1]

8. The Tribunal found that the circumstances in connection with which the Applicant was recognised as a refugee had ceased to exist and the Applicant could no longer continue to refuse to avail himself of the protection of Afghanistan. The Tribunal found that Article 1C(5) of the Convention applied to the Applicant.

9. The Tribunal then turned to consider whether the Applicant was a person to whom Australia has protection obligations for other reasons. The Tribunal noted the Applicant's other claims and said:

> *To the extent that these claims differ from the particular circumstances in connection with which the Applicant was recognised as a refugee, they are to be assessed under Article 1A(2) of the Convention.*[2]

10. The Tribunal was satisfied that the Applicant did not face a real chance of mistreatment or persecution by the Taliban because of his ethnicity, religion or any other Convention reason on return to his own district in Afghanistan[3]. The Tribunal did accept that the Applicant might, as a person returning from overseas and therefore perceived to have money, experience attempted extortion. However, the Tribunal found that local commanders who did prey upon or abuse local people, particularly those perceived to have money, did so for reasons of opportunistic self-aggrandisement rather than Convention-based persecution.[4]

11. Again, whilst the Tribunal accepted that the Applicant might face pressure to repay money borrowed by his father for his (the Applicant's) departure from Afghanistan, it was satisfied that any harm or mistreatment for that reason would not occur for any Convention reason.[5]

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[1] Court Book at 185
[2] Court Book at 186
[3] Court Book at 190
[4] Court Book at 191
[5] Court Book at 191

12. The Tribunal noted that lawlessness and security were significant issues in Afghanistan, including the area from where the Applicant had come, but stated:

> *The Tribunal is conscious that Afghanistan is not a peaceable secure democracy in which personal security can reasonably be taken for granted. However, these are issues affecting people generally. Such a situation does not of itself make an individual a refugee. Feared harm for this reason is not of itself persecution; a Convention reason or reasons must constitute at least the essential and significant motivation for the persecution feared. A generalised fear in relation to conditions in the country, considered separately from the Convention-related claims which the Tribunal has separately addressed, does not in this case amount to a well-founded fear of persecution for a Convention reason.*[6]

13. The Tribunal was satisfied that the Applicant did not have a well-founded fear of persecution for a Convention reason on return to Afghanistan and affirmed the delegate's decision not to grant a protection visa.

Application for judicial review

14. The Applicant commenced proceedings for judicial review by filing and application and an affidavit on 23rd April 2004. He filed a further amended application in court on the day of the hearing, seeking orders in the nature of certiorari, mandamus and prohibition.

15. The Applicant relies on the following grounds:

> *a) The Tribunal failed to address an issue that arose clearly on the finding of the Tribunal, that being whether he had a well founded fear of persecution for a Convention reason in the course of returning to his home district.*
>
> *b) The Tribunal erred by failing to consider whether any extortion practised upon the applicant return to Afghanistan could be for more than one reason, including membership of a particular social group comprised of Afghans returning from overseas.*

[6] Court Book at 192

Submissions

16. Counsel for the Applicant, Mr Karp, submitted that, despite the Tribunal's findings that the applicant could return to his home district[7], it made no mention of how he could get there with safety. He tendered a map of the area, showing that the Applicant's home district was landlocked within Afghanistan, southwest of Kabul, the capital.

17. It is submitted on behalf of the Applicant that the Tribunal is required to determine issues raised by its findings and the material and evidence before it (*Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287; *Minister for Immigration & Multicultural Affairs v Sameh* [2000] FCA 532; *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263 at [58] – [62]). There was a finding that the Applicant could return to his home district but not as to how he could get there, whether he could do so safely or whether he could get to his home district without having a well founded fear of persecution.

18. Mr Karp submitted that it was obvious that a finding that the Applicant could return to a particular area implied an ability to get there, and in safety. In the Tribunal decision the subject of *NBGV v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 690 at [31] the Tribunal considered the means of return, but in this case there was no such consideration.

19. Mr Karp further submitted that there was evidence by which the Tribunal could have found that the Applicant had a well founded fear of persecution in the course of his return, for example, the murder by the Taliban of 12 Hazaras[8]. In addition, there was no evidence that the Taliban had changed their ideology or their belief that Shiite Muslims are heretics. He submitted that the fact that the Taliban might have been concentrating on attacking coalition and government forces did not mean that they would not view Hazaras as opportunity targets.

20. It is Mr Karp's submission that the Tribunal's failure to address the issue of the means of return and the dangers in transit in the context of

[7] Court Book at 190
[8] Court Book 190

Articles 1C(5) and 1A(2) of the Convention constitutes jurisdictional error.

21. Turning to the Applicant's second ground, that the Tribunal erred by failing to consider whether any extortion practised upon the Applicant on his return to Afghanistan could be for more than one reason, including membership of a particular social group comprised of Afghans returning from overseas, the Applicant concedes that one objective of any attempted extortion would be, as the Tribunal said, self aggrandisement. However, Mr Karp submitted that any extortion has this objective and extortion victims are convenient targets. He submitted that the Tribunal's reasoning necessarily implies that the Applicant would be targeted, partly at least, because he would be an Afghan who has returned from overseas.

22. This raised the question of whether people such as the Applicant constitute a particular social group, being a group comprised of people:

    a) who are identifiable by an attribute or characteristic common to all;

    b) which is not a shared fear of persecution; and

    c) which distinguishes the group from society at large.

23. Counsel for the Applicant referred the Court to *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, where the question of a particular social group was considered by the High Court. Mr Karp submitted that by dismissing the Applicant's claim on the basis that any extortion of the Applicant was merely "self aggrandisement" the Tribunal thereby failed to consider whether there could be multiple reasons for persecution.

24. The submission goes that by failing to consider and address the issue of multiple reasons for persecution, the Tribunal fell into jurisdictional error.

25. For the Respondent Minister, Mr Johnson of counsel submitted that, in respect of the Applicant's first ground, that the Tribunal failed to address the issue of whether the applicant had a well founded fear of persecution for a convention reason in the course of returning to his

home district, that there is a difference between a failure to deal with a claim and a failure to deal with a piece of evidence (see *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 at [42]). The Applicant, he submitted, was unable to point to any evidence that this claim was made at all. The Applicant did not say that he could not safely return to the area where he lived in any way that was not dealt with by the Tribunal. The Tribunal did find that the Applicant could get back to the area from which he had come.[9] It was not put to the Tribunal that the Applicant could not make the trip safely or that there was only one way he could go. Again, the independent information at Court Book 118 and other places did not say that the Applicant could only get home a particular way.

26. Mr Johnson noted that the Applicant sought to rely upon evidence given of a specific instance of a group of Hazaras being attacked and killed in January 2004. The Tribunal referred to that evidence and noted (at page 190 of the Court Book) that the Applicant stated that this event had occurred in the Applicant's home province[10]. The Tribunal then referred to material submitted by the Applicant himself and found that the incident had not occurred in that province at all, but on the borders of two other provinces, Helmand and Uruzgan[11]. The Tribunal was also not aware of any similar post-Taliban instances in the Applicant's home province or elsewhere. The Tribunal also found:

> *Although sporadic Taliban attacks have been directed against foreign aid workers and their Afghan assistants, government officials and government and international forces*

There were no reports of:

> *Attacks on Hazara communities (although there have been reported Taliban attacks on local Pashtun communities in the strongly Pashtun southern province of Zabul.*[12]

27. Mr Johnson also submitted that, properly considering the claims or evidence that were rejected by the Tribunal, there was nothing put forward that obliged the Tribunal to consider whether the Applicant would face a well-founded fear of persecution if he were to return to

[9] Court Book 189 and 190
[10] The name of the applicant's home province has been deleted to protect his identity.
[11] Court Book 190
[12] Court Book at 190

his home province. He further submitted that there was no evidence by the Applicant that he would have to travel by some particular route that would expose him to some particular risk that had not been dealt with by the Tribunal. Accordingly, he submitted that the Tribunal was not jurisdictionally obliged to do more than it did.

28. Turning to the Applicant's second claim, that the Tribunal erred by failing to consider whether any extortion practised upon the Applicant on his return to Afghanistan could be for more than one reason, including membership of a particular social group comprised of Afghans returning from overseas, Mr Johnson submitted that the Applicant's contentions were incorrect.

29. Mr Johnson went on to submit that, although the Applicant may be perceived to have money upon his return from overseas and, therefore, experience attempted extortion, this was by reason of "opportunistic self-aggrandisement" on the part of the extorters and not for a Convention reason.[13] The fact that the Tribunal referred to "Convention based persecution" plainly referred in context to the requirement that there be a Convention reason for the persecution feared by the Applicant. He submitted that the question of whether there was a Convention reason for any extortion was a question of fact for the Tribunal.

30. Mr Johnson also submitted that the Applicant's submission that the Tribunal did not consider whether there might be another reason for the extortion other than the non-Convention reason that it gave cannot be sustained. The Tribunal said at page 172 of the Court Book:

> *Persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared.*

31. The Tribunal referred to s.91R(1)(a) of the Migration Act. He submitted that the Court cannot be satisfied that the Tribunal did not have that in mind when it found that any extortion that might be faced

[13] Court Book at 191 and 192

would not be "Convention-based persecution"[14] or "for a Convention reason".[15]

32. With respect, I find this latter argument unconvincing.

Conclusions

33. The Applicant relies on two grounds. It is contended on behalf of the Applicant that the Tribunal's failure to address the issue of the Applicant's means of return to his home district in Afghanistan and the dangers in transit in the context of Articles 1C(5) and 1A(2) of the Convention constitutes jurisdictional error. I am not persuaded that this is so.

34. I agree with the submission on behalf of the Minister that there is no evidence that the Tribunal failed to consider any claim. The Tribunal was not satisfied that the Applicant had a well-founded fear of persecution in Afghanistan or "on return to his own district".[16]

35. The Tribunal did refer to the evidence of the Hazaras being killed in January 2004, but noted that this incident did not occur in the Applicant's home district. The Tribunal considered whether there was evidence of attacks by the Taliban on Hazara communities in the Applicant's district, but found that there were not, even though there were reports of sporadic attacks against foreign aid workers and their Afghan assistants, government officials and government and international forces.

36. There was no evidence that the Applicant would face some particular danger of persecution if he were to return to his home province or that he would be obliged to travel by a particular route which had its own specific dangers. The Tribunal considered the material that was put to it and was not required to do anything further. The Applicant's first ground fails.

37. The Applicant's second ground is that the Tribunal failed to consider that there may be more than one reason for any extortion that the

[14] Court Book 191
[15] Court Book 192
[16] Court Book 190

Applicant might face by means of his membership of a particular social group. The Tribunal found that, although the Applicant might be perceived to have money because he had returned from overseas, this was by reason of "opportunistic self-aggrandisement" and not for a Convention reason. This, of course, is not a Convention reason. As the Tribunal said:

> *Persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.*[17]

38. With respect, I do not agree with the contention of counsel for the Minister that the Court cannot be satisfied that the Tribunal did not have that in mind when it found that if the Applicant did face extortion it would not be "Convention-based persecution" or "for a Convention reason". In my mind, the Tribunal needed to consider whether there was any other reason that might constitute the essential and significant motivation for the extortion and, if there was, whether that reason could be characterised as a Convention reason. By failing to do so, the Tribunal fell into jurisdictional error.

39. As there appears to be a jurisdictional error, the Tribunal decision does not attract the protection of s.474(1) of the Migration Act. I propose to grant the application and make orders in the nature of certiorari, mandamus and prohibition.

40. It would seem to me, as the Applicant has been legally represented throughout these proceedings, that I should consider an order for costs in his favour.

I certify that the preceding forty (40) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: Virginia Lee

Date: 13 March 2007

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[17] Court Book 172