FEDERAL COURT OF AUSTRALIA

SZNZL v Minister for Immigration and Citizenship [2010] FCA 621

Citation:	SZNZL v Minister for Immigration and Citizenship [2010] FCA 621
Appeal from:	S*ZNZL v Minister for Immigration & Anor* [2009] FMCA 1301
Parties:	**SZNZL v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number(s):	NSD 14 of 2010
Judges:	**BARKER J**
Date of judgment:	21 June 2010
Catchwords:	**MIGRATION** – whether applicant's oral notification to Minister of change of address is legally effective for the purposes of the Migration Act 1958 (Cth)
Legislation:	*Migration Act 1958* (Cth) s 52(1), s 52(3), s 52(3A), s 52(3B), s 494B, s 494B(4), s 494C *Migration Regulations 1994* (Cth) reg 2.13, reg 2.14, reg 2.16
Date of hearing:	4 May 2010
Date of last submissions:	17 June 2010
Place:	Perth (heard in Sydney)
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	48
Counsel for the Appellant:	Mr S Sivaloganathan (Pro Bono)
Counsel for the First Respondent:	Mr G Kennett and Ms A Nanson
Solicitor for the First Respondent:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 14 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZNZL**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **BARKER J**

DATE OF ORDER: **21 JUNE 2010**

WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. The appeal be dismissed

2. The appellant to pay the first respondent's costs to be taxed if not agreed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

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BETWEEN: **SZNZL**
Appellant

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REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **BARKER J**
DATE: **21 JUNE 2010**
PLACE: **PERTH**

REASONS FOR JUDGMENT

APPEAL

1 The appellant appeals against a decision of a Federal Magistrate made 18 December 2009 upholding a decision of the Refugee Review Tribunal (RRT or Tribunal) that it did not have jurisdiction to consider a review application lodged by the appellant because it was lodged out of time. The review application was lodged in respect of an earlier decision of a delegate of the Minister for Immigration and Citizenship (Minister) made 5 June 2009 rejecting the appellant's claims that he was entitled to a Protection (Class XA) Visa.

ISSUE

2 The main issue on this appeal is whether the Minister notified the appellant of the refusal of the protection visa application in a legally effective way so that the 28 day time period for lodging a review application with the RRT began running. If it did, then it is agreed the time period for lodging a review application had expired by the time the appellant actually lodged a review application and the Tribunal did not have jurisdiction to consider it.

3 The issue is of critical concern to the appellant because the time limit imposed under the Act cannot be extended by the Tribunal. Failure to comply with the time limit finally determines an appellant's opportunity to obtain a review on the merits of the Minister's delegate's decision.

FACTS

4 On 24 March 2009 the appellant lodged an application for a protection visa. It is unnecessary for the present purposes to go into the details of that application.

5 The application included both a Form 866B application (Persons included in this application and family composition) and a Form 866C application (Application for an applicant who wishes to submit their own claims to be a refugee). In the Form 866C application at [15], the appellant was required to state his "Current residential address in Australia", which he disclosed to be an address in Rolfe Avenue, Gungahlin ACT 2912. In each form ([21] of the Form 866B and [67] of the Form 866C) the appellant undertook "to inform the Department of Immigration and Citizenship if I intend to change my address for more than 14 days while my application is being considered".

6 By letter dated 25 March 2009, the Department of Immigration and Citizenship (Department) acknowledged receipt of the appellant's protection visa application. Amongst other things, the letter dealt with the topic of "Communication with DIAC" and advised the appellant:

> Please feel free to contact us by telephone about the progress of your application. However, while your application is being processed, any communication with us, including any additional information relating to your application must be in writing. Please note that, for privacy reasons, information concerning your application will be restricted.
>
> If you change your address for more than 14 days, you must tell us your new address. Use Form 929: Client Change of Address available from any DIAC Office or our website.

7 The next written communication sent by the Department was a letter from an officer of the Department to the appellant, dated 6 April 2009, sent by Registered Post to the Rolfe Avenue address. This letter advised the appellant that an interview in relation to his application for a protection visa was scheduled for 1pm on 28 April 2009 in Sydney. However, it seems that the invitation to the interview conveyed by this letter was not received

by the appellant, as at some point about that time he moved address. In any event, the appellant did not attend the interview in Sydney on 28 April 2009, pursuant to the invitation.

8 The next formal notification sent by the Department to the appellant was a letter from the Minister's delegate, dated 5 June 2009, sent by Registered Post to the appellant at a different address, this time in Inglewood Street, Gungahlin. That letter advised that the application for the visa had been refused. The letter also advised the appellant that he was entitled to apply to the RRT for a review of the decision and that an application for review must be made within 28 calendar days after the date he was taken to have received the letter. However, it seems the appellant only became aware of the content of this letter some time after it was sent to him, when he was no longer living at the Inglewood Street address. When he did become aware of the contents he purported to make an application to the RRT for review of the refusal of the protection visa application. However, at that point, assuming the notification was legally effective, he was outside the 28 day period for seeking review, which ended on about 15 July 2009. His application to the RRT was lodged on 31 July 2009.

9 The explanation for how it was that the letter from the Minister's delegate was sent to the appellant at the Inglewood Street address is as follows. The appellant apparently telephoned the Department on 29 April 2009, spoke to an officer and stated that his "current address" was the Inglewood Street address. The evidence of this telephone advice from the appellant is a file note made by the "case officer" in the Department, who was also the Minister's delegate when the decision was ultimately made to refuse the protection visa application. The file note reads:

> The applicant rang today. He stated that his current address is:
> … Inglewood Street
> Gungahlin ACT 2912
> ICSE has been updated.

10 The "ICSE" referred to is the Department's computer system. The result of the updating apparently was that if a letter were to be sent to the applicant for the protection visa, it would automatically go to the address entered on ICSE. As a result, when the Minister's delegate's letter dated 5 June 2009 was generated, it was forwarded to the Inglewood Street address.

11 As mentioned above, the appellant was apparently not living at the Inglewood Street address when the letter of 5 June was sent to him at that address. Instead, he was, apparently,

by then residing at another address - in Rolfe Avenue, Gungahlin (although at a different street number from that at which he had previously resided). However, it was not until 10 July 2009 that the appellant lodged a Form 929 with the Department disclosing his contact details at the new Rolfe Avenue address.

THE TRIBUNAL'S DECISION

12 The Tribunal held the appellant had been properly notified of the delegate's decision and was taken to have been notified on 17 June 2009 under the terms of the *Migration Act 1958* (Cth) (the Act) and the *Migration Regulations 1994* (Cth) (the Regulations). The RRT noted that one of the methods specified in s 494B of the Act consists of the Minister despatching a document within three working days of the date of the document by prepaid post or other prepaid means to the last address for service or the last residential or business address provided to the Minister by the recipient for the purpose of receiving documents: s 494B(4).

13 What the appellant told the Department, who he spoke to and what he said on 29 April 2009, was not the subject of any affidavit or other direct testimony in the RRT proceedings. However, the inference seems to have been drawn at material times that the appellant did in fact telephone the Department on 29 April 2009, spoke to an officer and provided his changed address to the Inglewood Street address, intimating it was his "current address". The further inference seems also to have been drawn that he thereby intended to change his address "for more than 14 days" while his application was being considered, and so that was the address to which the Minister should thenceforth address communications to him.

14 In those circumstances the RRT noted the application for review it had received was outside the "mandatory" time limit for seeking review under the Act, and so was not a valid application and it had no jurisdiction to consider it.

THE DECISION OF THE FEDERAL MAGISTRATE

15 The Federal Magistrate on application for judicial review of the decision of the RRT upheld the decision of the Tribunal that it did not have jurisdiction to consider the review application.

16 Again, the Federal Magistrate accepted that the telephone advice of the appellant concerning his change of address to the Inglewood Street address was effectual. In doing so the Federal Magistrate drew the same inferences the RRT seems to have drawn. The Federal Magistrate, like the RRT, did not receive any direct evidence from the appellant or otherwise concerning these matters but did note (in [8] of his reasons) that before the Court the applicant had "confirmed that he had provided that address". At [8] and [41], the Federal Magistrate noted the address in question was stated to be the appellant's "current address".

17 The Federal Magistrate (at [42] of his reasons) accepted the submission made on behalf of the Minister that the relevant address for the purposes of a notification letter was the current residential address notified by telephone.

18 The Federal Magistrate, at [44], found that when the Minister's submission was read in light of the undertaking of the appellant to inform the Department of a change of address for more than 14 days while his application was being considered, a "clear inference" can be drawn that the appellant provided his change of address in compliance with this undertaking and for the purpose, amongst other things, of the Minister's Department being able to communicate with him.

19 The Federal Magistrate refused to countenance a strict obligation on the Minister to send the notification letter to the last residential address of the appellant notified in writing because, as he explained at [47] of his reasons, to do so would result in a nonsense. The Federal Magistrate said that if such a strict approach were to be adopted, it would mean that applicants would continue to have correspondence sent to an address from which they had physically moved, as appeared to be the circumstance in the appellant's case.

20 Consequently, the Federal Magistrate held that the RRT was correct to find it did not have jurisdiction to consider the review application which had been lodged out of time (and in respect of which the Tribunal had no power to extend the time for lodging the application).

APPEAL TO THIS COURT

21 The appellant by notice of appeal filed 6 January 2010, appeals from the whole of the judgment of the Federal Magistrate and states two grounds of appeal, namely:

1. The Federal Magistrate failed to take into consideration that the Tribunal and the delegate of the Minister had not dealt in any substantive way with a key component of the claim that his life would be under threat on his return to India.

2. The Federal Magistrate should have found that the Tribunal erred by not complying with its undertaking to conduct a hearing to give the appellant an opportunity to address the issues.

22 In light of the background I have provided, I take these two grounds of appeal to constitute a complaint that the Federal Magistrate erred in law by failing to find that the Tribunal did have jurisdiction to consider the substance of the appellant's claim to refugee status. Thus the main issue on the appeal is, as stated above, whether, under the strict letter of the law as set out in the Act and the Regulations, the time for lodging a review application started running soon after the notification letter of 5 June 2009 was sent out and so the appellant lodged his review application in the RRT out of time.

23 This issue in turn revolves around the question whether the notification by the Minister's delegate of the decision refusing the protection visa application was effectually sent, as a matter of statutory requirement, to the Inglewood Street address notified by the appellant to the Department by telephone on 29 April 2009. Put simply, the question is whether it is open to the Minister to act on the telephone advice of an applicant for a protection visa concerning their change of current residential address.

24 When this appeal came on for hearing on 4 May 2010, the appellant was self-represented, but assisted by an interpreter. I raised issues with counsel for the Minister and the appellant concerning the proper construction of s 52, and in particular the import of the expression in subs 3A, "must tell the Minister", and whether it permitted the provision of telephone advice in the light of the primary obligation under s 52(1) and the Regulations to provide advice to the Minister in writing. The issue of the proper construction of the provision did not, on its face, seem to have been fully explored in the proceedings before the Federal Magistrate. In those circumstances I adjourned the proceeding to enable the Minister to put on further written submissions on this point and made orders under O 80, sub rule 4(1) of the *Federal Court Rules 1979* (Cth) for the appellant to be referred to a legal practitioner on the pro bono panel for legal assistance in the proceeding and to put on written submissions

in relation to the questions identified by me in the course of that hearing, as then appeared on the transcript. This decision is made in the light of the written submissions received.

25 On behalf of the appellant, it is primarily argued that it was not open to the Minister's delegate to send the notification letter to the Inglewood Street address because there is no evidence that the appellant communicated that address as the relevant address for the purpose of receiving documents or an address at which he intended to reside for more than 14 days while the protection visa application was being considered. It is not argued by the appellant that a change of residential address communicated by telephone can never be acted upon by the Minister.

CONSIDERATION

26 I noted at the outset that in his protection visa application the appellant undertook to inform the Department if he intended to change his address for "more than 14 days while my application is being considered". This undertaking and obligation was confirmed in the Department's letter acknowledging receipt of the protection visa application. In that letter, the appellant was advised to use a Form 929 if changing address, that is, to give the notification in writing.

27 The obligation to advise such information in writing is one that finds particular expression in the Act and Regulations. One indeed would expect that there should be such a requirement. The Department deals with many protection visa and other applications under the Act and it is obviously appropriate that a formal record of communications be kept of such dealings as a matter of good public administration. Secondly, it is important that persons having dealings with the Minister through the Department be obliged to authenticate their identity so that false or misleading information is not provided to the Minister or the Department by unauthorised persons concerning them.

28 The Act contains various provisions that emphasise the need for information provided by a person dealing with the Minister through the Department to be in writing. For present purposes, s 52 of the Act, which deals with communications with the Minister in the following relevant terms, is of primary importance:

> (1) A visa applicant or interested person must communicate with the Minister in the prescribed way.

> (2) The regulations may prescribe different ways of communicating and specify the circumstances when communication is to be in a particular way. For this purpose, a way of communicating includes any associated process for authenticating identity.
> (3) If the applicant or interested person purports to communicate anything to the Minister in a way that is not the prescribed way, the communication is taken not to have been received unless the Minister in fact receives it.
> (3A) A visa applicant must tell the Minister the address at which the applicant intends to live while the application is being dealt with.
> (3B) If the applicant proposes to change the address at which he or she intends to live for a period of 14 days or more, the applicant must tell the Minister the address and the period of proposed residence.

29 The "prescribed way" of communicating referred to in s 52(1) is contained in the Regulations: reg 2.13 and reg 2.14. Regulation 2.13(2) requires such communications to be in writing, except in identified circumstances, not presently relevant. Regulation 2.13(3) and reg 2.13(4) require certain information (the applicant's full name, date of birth and identifying number) to be included in the communication. Regulation 2.14 requires the written communication to be sent to the office at which the visa application was made, unless the Minister has specified another office.

30 The Minister accepts that the provision of the Inglewood Street address by telephone by the appellant did not satisfy these requirements. That address was not provided in writing "in the prescribed way". The Minister otherwise contends that the information supplied answered the description the appellant was required to give, if he proposed to change the address at which he intended to live for a period of 14 days or more, for the purposes of s 52(3B). As a result, the Minister says the delegate was entitled to act on the advice of the appellant under s 52(3), as the Minister in fact received this communication, and to notify the refusal of the protection visa application by letter sent to the Inglewood Street address.

31 There seems to be no doubt that the Minister in fact received a further communication of the appellant of a changed residential address on 29 April 2009. For s 52(3) purposes, it is not necessary that it be shown that the person who holds the office of the Minister personally received the information. It is sufficient if the information was conveyed to an officer of the Minister's Department and is held for the Minister's purposes. In this case I am satisfied that the communication of the appellant in question was made to an officer of the Department – indeed, the officer designated to be the Minister's delegate in relation to the visa protection application of the appellant – and was held in the Department for the Minister's purposes.

32 So far as that communication is concerned, I am also satisfied that it was, properly construed, a communication that the appellant's residential address for all relevant purposes was, at that point, the Inglewood Street address, that is to say the communication was made by the appellant on the basis that he was obliged to inform the Department of that address if he intended to change his address for more than 14 days. It may properly be inferred in these circumstances that the change of address was supplied on that basis and that the appellant intended to be at that address for more than 14 days. It is not to the point that no direct evidence was led in the proceedings below as to exactly what was communicated by the appellant to the officer of the Department. That the information was conveyed is not in doubt. It was in fact confirmed by the appellant during the proceedings before the Federal Magistrate, as noted earlier. At no time in the proceedings below did the appellant suggest that information he conveyed had some other purpose or limited content.

33 The effect of s 52(3) of the Act, then, is that ordinarily communications with the Minister by a visa applicant must be in writing. However, the failure to make the communication in writing does not mean that another form of communication, for example by telephone, is not effective where the Minister in fact receives it. Here, the evidence is that the Minister in fact received the telephone communication, being a communication that the appellant intended (by inference) to reside at the Inglewood Street address for more than 14 days. That communication is one received pursuant to the Act and it is effective for its purposes.

34 Once the Minister's delegate made the decision to refuse the appellant's protection visa application, the delegate was obliged by s 66(1) of the Act to "notify" the applicant of the decision in the "prescribed way".

35 The "prescribed way" for this purpose is to be found in reg 2.16 of the Regulations which by reg 2.16(3) provides that a decision to refuse to grant a visa must be notified by "one of the methods specified in s 494B of the Act". Section 494B sets out five methods by which the Minister may give a document to a person. Section 494B(4) in particular provides:

> (4) Another method consists of the Minister dating the document, and then dispatching it:
> (a) within 3 working days (in the place of dispatch) of the date of the document; and
> (b) by prepaid post or by other prepaid means; and
> (c) to:

(i) the last address for service provided to the Minister by the recipient for the purposes of receiving documents; or
(ii) the last residential or business address provided to the Minister by the recipient for the purposes of receiving documents; or
(iii) if the recipient is a minor—the last address for a carer of the minor that is known by the Minister.

36 Where a document is sent by that method, s 494C(4) conclusively deems it to have been received by the person to whom it was sent seven working days after the date of the document. Sending a notification letter in accordance with s 424B(4) therefore has the result that the notification is taken to have occurred at the end of the relevant period, regardless of whether it was actually received.

37 In these circumstances, it was open to the Minister's delegate to cause the notification letter to be sent to the last residential address advised by the appellant, namely by sending it to the Inglewood Street address.

38 As the Federal Magistrate observed, it would be a nonsense for the Minister's delegate to send the notification letter to some other address at which the delegate was aware the appellant was no longer residing.

39 The appeal does not therefore need to be resolved by reference to the question whether the obligation to "tell the Minister" of a change of address pursuant to s 52(3A) and (3B) enables an applicant to communicate an address or change of address by written or oral means of communication.

40 It is also unnecessary for me to deal with a related question whether a visa applicant is obliged to provide the change of address information to which s 52(3B) distinctly applies by virtue of a separate obligation on a visa applicant under s 104(1) of the Act to "inform an officer" of any change in circumstance which makes "an answer to a question on [the applicant's] application form incorrect". The Minister in this case submits that s 104 is relevant to the possible availability of power under s 109 of the Act to cancel a visa that has been granted to a person – which is clearly not relevant in the present case. It is not necessary for me to consider the application of s 104 in this case, and its possible relationship to s 109 of the Act, as the matter is to be wholly resolved by reference to s 52.

41 In these circumstances, the notification letter indicating that the protection visa application had failed, which was dated 5 June 2009 and sent to the Inglewood Street address was deemed to have been received seven working days later on about 16 or 17 June 2009. The review application lodged with the RRT, which needed to be filed within 28 days of that date, by 15 or 16 July 2009, was not in fact lodged until 31 July 2009, well outside that period. As there was no power in the RRT to extend the time for lodging the review application, the application was not validly made to the RRT and the RRT was not competent to consider the application. In that sense the RRT was without jurisdiction to consider the application lodged.

42 For these reasons, the RRT was correct in refusing to deal with the appellant's review application and the Federal Magistrate was correct in upholding the decision of the RRT to that effect. As a result it has not been demonstrated on this appeal that the Federal Magistrate erred in law in dismissing the appellant's judicial review application concerning the RRT's decision on the basis that he did.

DENIAL OF PROCEDURAL FAIRNESS

43 In the written submissions filed on behalf of the appellant, the question of denial of procedural fairness was raised as a further or alternative issue. It is contended that by apparently acting upon a poorly documented telephone conversation, there has been a denial of procedural fairness. The contention is put that the various statements and exhortations from the Department about the importance of communicating in writing would have created an expectation – even in an English-speaking applicant – that for any notification of change of address to be acted upon by the Department as a postal address, it must be communicated in writing.

44 In my view, the point can be disposed of quite directly on the facts. The fact that the appellant telephoned the Department and provided a new current address which gave rise to the inference that this address was the address to which correspondence concerning the application for a protection visa should be directed, is inconsistent with the expectation contended for. The actual expectation of the appellant was that he could give this information by telephone to the Department and the Minister would act on it. It can be reasonably inferred that the appellant expected the Minister to communicate with him at the new address so notified.

45 As I say, this point can be disposed of quite directly on this basis. In those circumstances I do not need to deal with the further submissions of the Minister that any want of procedural fairness on account of the procedures adopted by the Minister's delegate cannot affect the jurisdiction of the Tribunal. In that regard the Minister submits that if there were some denial of procedural fairness in the process the delegate was required to follow by the Act (which is denied), it might follow that the delegate's decision was liable to be set aside; but that would not affect the jurisdiction of the Tribunal. If the appellant wished to have the delegate's decision set aside for that reason, he would have needed to commence proceedings in the High Court, as a result of s 476(2)(a) and s 476A of the Act.

46 The Minister contends that the Tribunal has obligations of procedural fairness in the course of conducting a review, which are exhaustively codified by the Act in Div 4 of Pt 7; but no review is commenced unless an application is made which engages the Tribunal's jurisdiction. While the Tribunal needs to form a view about whether it has jurisdiction in each case, it cannot conclusively determine its own jurisdiction and its opinion on the issue has no legal force in itself. Thus no issues of procedural fairness arise in connection with the Tribunal's consideration of whether it has jurisdiction. The issue before the Court is simply whether the Tribunal's conclusion was right, not how it arrived at that conclusion.

47 Without needing to decide the point finally in this case, it would seem to be correct to state that, if the appellant believed that the Minister's delegate had made a decision that was void and of no effect by reason of any failure of the Minister's delegate to accord procedural fairness in the making of a decision, he would not proceed to seek review of the decision resulting from the faulty process in the RRT, but would move to quash the decision in the manner suggested by the Minister. That is because the RRT does not have the judicial power to quash such a faulty decision. The appellant would only proceed to seek review in the Tribunal if he accepted that a valid decision had been made by the delegate which was wrong as a matter of principle having regard to the facts of the case.

48 In this case no issue of procedural fairness concerning the conduct of the RRT is raised. Consequently, no error of law has been identified in respect of the decision of the Federal Magistrate now appealed from.

CONCLUSION AND ORDER

1. The appeal be dismissed.

2. The appellant to pay the first respondent's costs to be taxed if not agreed.

I certify that the preceding forty-eight (48) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 21 June 2010