FEDERAL COURT OF AUSTRALIA

SZLPN v Minister for Immigration and Citizenship [2010] FCA 202

Citation:	SZLPN v Minister for Immigration and Citizenship [2010] FCA 202
Appeal from:	SZLPN v Minister for Immigration [2009] FMCA 1011
Parties:	**SZLPN v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND ANOR**
File number:	NSD 1259 of 2009
Judge:	**FLICK J**
Date of judgment:	9 March 2010
Catchwords:	**MIGRATION** – inquisitorial function of Refugee Review Tribunal – primary responsibility of an appellant to advance submissions relevant to claims made – findings of fact – findings as to credibility - no benefit of the doubt – no jurisdictional error **Held:** Appeal dismissed
Legislation:	*Federal Court of Australia Act 1976* (Cth), s 47A *Migration Act 1958* (Cth) *High Court Rules*, r 41.02.1 *Federal Court Rules*, O 35 r 3
Cases cited:	*Abebe v Commonwealth* (1999) 197 CLR 510, applied *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, cited *Gholami v Minister for Immigration and Multicultural Affairs* [2001] FCA 1091, cited *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547, applied *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, 259 ALR 429, applied *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, applied *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1, applied *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10, applied *NBKT v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 195, 156 FCR 419, cited

Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437, cited
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63, 228 CLR 152, cited
SZJBA v Minister for Immigration and Citizenship [2007] FCA 1592, 164 FCR 14, cited
SZJZS v Minister for Immigration and Citizenship [2008] FCA 789, 102 ALD 318, cited
SZLGP v Minister for Immigration and Citizenship [2009] FCA 1470, applied
SZKLO v Minister for Immigration and Citizenship [2008] FCA 735, cited
SZLPN v Minister for Immigration [2008] FMCA 1434, cited
SZLPN v Minister for Immigration [2009] FMCA 1011, affirmed
SZLVZ v Minister for Immigration and Citizenship [2008] FCA 1816, cited
SZMUV v Minister for Immigration and Citizenship [2009] FCA 205, applied
SZNNK v Minister for Immigration and Citizenship [2009] FCA 1386, applied
SZNRZ v Minister for Immigration and Citizenship [2010] FCA 107, cited

Date of hearing:	9 March 2010
Date of judgment:	9 March 2010
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	24
The Appellant:	The Appellant appeared in person
Counsel for the First Respondent:	Mr J D Smith
Solicitor for the First Respondent:	Australian Government Solicitor (AGS)

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1259 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZLPN** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**FLICK J**
DATE OF ORDER:	**9 MARCH 2010**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The Appellant is to pay the costs of the First Respondent.

3. Orders 1 and 2 are to take effect as if pronounced on 23 March 2010.

4. All references as to the identity of the Appellant in the proceedings today are to be deleted from any transcript of the proceeding in accordance with s 91X of the *Migration Act 1958* (Cth).

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.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1259 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZLPN** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**FLICK J**
DATE:	**9 MARCH 2010**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

(Revised from Transcript)

1 The present Appellant is a citizen of India.

2 He arrived in Australia on 28 March 2007 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa on 5 April 2007. A delegate of the Minister refused that application on 9 May 2007 and on 5 June 2007 he applied to the Refugee Review Tribunal for review.

3 On 9 October 2007 the Tribunal affirmed the delegate's decision and handed down its decision on 30 October 2007. That decision of the Tribunal was quashed by a decision of the Federal Magistrates Court: *SZLPN v Minister for Immigration* [2008] FMCA 1434.

4 Thereafter, on 10 December 2008, the Tribunal again invited the now Appellant to appear before the Tribunal, differently constituted, to give oral evidence and present arguments in support of his claims. A hearing apparently took place on 13 January 2009 but was not then completed. A re-scheduled date for the resumed hearing was fixed for 24 March 2009 and then further re-scheduled to 28 April 2009. A hearing then took place and took

approximately 2½ hours. An invitation to comment on information was then forwarded to the now Appellant on 4 May 2009.

5 The Refugee Review Tribunal again affirmed the delegate's decision by its decision made on 9 June 2009.

6 An application to review that subsequent decision of the Tribunal was then filed with the Federal Magistrates Court on 26 June 2009. That Court dismissed the application in October 2009: *SZLPN v Minister for Immigration* [2009] FMCA 1011. In dismissing the application, the Federal Magistrate adopted a course of incorporating within his reasons for decision substantial extracts from the written submissions as filed on behalf of the Respondent Minister, and incorporated extracts from an affidavit that had been filed by the now Appellant and treated that extract as a submission. Such a practice is to be discouraged: *SZMUV v Minister for Immigration and Citizenship* [2009] FCA 205. Although the reality may be quite different, such a practice only fosters a belief — perhaps otherwise unfounded — that no real, genuine and independent consideration has been given to the merits of the case and the arguments sought to be advanced: cf. *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 441 to 442 per Meagher JA; *SZKLO v Minister for Immigration and Citizenship* [2008] FCA 735 at [19] to [20].

7 On 6 November 2009 a *Notice of Appeal* was filed in this Court. The sole *Ground of Appeal* was there set forth as follows (without alteration):

> The Court below erred in that it ought to have held that on the evidence before the Tribunal it was open to the Tribunal to find that the appellant was a refugee within the meaning of the Act. In such circumstances the Tribunal erred in that :
> Particular:
>
> i. it failed to properly apply the consideration that applicants for refugee status ought to be given the benefit of the doubt in circumstances where the Tribunal entertained the possibility that the applicants claims are plausible, which was the case here.

8 The Appellant appeared before this Court today unrepresented. An interpreter was provided, albeit with the interpreter physically being located in India and providing his services to the Appellant via a telephone link-up which had previously been arranged. An interpreter fluent in the Appellant's dialect could not be found within Australia. Just as s 47A of the *Federal Court of Australia Act 1976* (Cth) permits "*testimony to be given by video link, audio link, or other appropriate means*", there was considered to be no impediment to the

interpreter's services being provided in this manner to facilitate the ability of the Appellant to advance his submissions in support of his appeal.

9 Considerable difficulty was experienced today in the translation of that which the Appellant sought to communicate to the Court and in the translation of the Respondent Minister's submissions to the Appellant. Notwithstanding that difficulty, it is considered that the Appellant has now been given an adequate opportunity in which to advance his case. It may be noted that a claimed deficiency in the previous provision of interpreter and translation facilities had also been raised before the Federal Magistrate: [2009] FMCA 1011 at [8]. Difficulties at the outset of the hearing today, however, were ultimately overcome. In essence, the Appellant sought a further opportunity in which to present his claims.

10 The Appeal is to be dismissed.

11 The *Ground of Appeal* is a challenge to the factual findings as made by the Tribunal. But findings of fact are matters entrusted to the Tribunal alone: *Kopalapillai v Minister for Immigration and Multicultural Affairs* ("*Kopalapillai*") (1998) 86 FCR 547 at 552, 559; *SZNNK v Minister for Immigration and Citizenship* [2009] FCA 1386 at [20]. "*It is not for this Court to reconsider the Tribunal's factual findings*": *NBKT v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 195 at [81], 156 FCR 419 at 440 per Young J (Gyles and Stone JJ agreeing). Jurisdictional error thus does not comprehend errors of fact as to the merits of the case advanced before the Tribunal nor the weight attributed to evidence going to the issues raised before the Tribunal: *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [10] per Gray, Tamberlin and Lander JJ.

12 No jurisdictional error is exposed simply by reason of a claimant contending that "*it was open to the Tribunal*" to have reached a different conclusion. It is simply no part of the function of either the Federal Magistrates Court or this Court on appeal to consider the factual merits of the decision of the Tribunal: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 281 to 282.

13 The Tribunal performs an inquisitorial function: *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, 259 ALR 429. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ there observed:

> [18] It has been said in this Court on more than one occasion that proceedings before the Tribunal are inquisitorial, rather than adversarial in their general character. There is no joinder of issues as understood between parties to adversarial litigation. The word "inquisitorial" has been used to indicate that the Tribunal, which can exercise all the powers and discretions of the primary decision-maker, is not itself a contradictor to the cause of the applicant for review. Nor does the primary decision-maker appear before the Tribunal as a contradictor. The relevant ordinary meaning of "inquisitorial" is "having or exercising the function of an inquisitor", that is to say "one whose official duty it is to inquire, examine or investigate". As applied to the Tribunal "inquisitorial" does not carry that full ordinary meaning. It merely delimits the nature of the Tribunal's functions. They are to be found in the provisions of the Migration Act. The core function, in the words of s 414 of the Act, is to "review the decision" which is the subject of a valid application made to the Tribunal under s 412 of the Act.

See also: *SZJBA v Minister for Immigration and Citizenship* [2007] FCA 1592 at [57], 164 FCR 14 at 28 to 29 per Allsop J.

14 Notwithstanding this inquisitorial function, it nevertheless remains the primary responsibility of a claimant to present such evidence and to advance such submissions as are considered relevant to the claims being made: *Abebe v Commonwealth* (1999) 197 CLR 510 at 576. Gummow and Hayne JJ thus observed that it was:

> … for the applicant to advance whatever evidence or argument she wishes to advance in support of her contention that she has a well-founded fear of persecution for a Convention reason. The tribunal must then decide whether that claim is made out.

See also: *SZJZS v Minister for Immigration and Citizenship* [2008] FCA 789 at [15] to [16], 102 ALD 318 at 321 to 322. "*[I]t is for the applicant for a protection visa to establish the claims that are made*": *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63 at [40], 228 CLR 152 at 164.

15 And an assessment of the claims advanced and the facts presented must necessarily be undertaken in recognition of the difficulties confronting some claimants for refugee status: *Kopalapillai*, supra. O'Connor, Branson and Marshall JJ there observed at 558 to 559:

> Whilst a decision maker concerned to evaluate the credibility of the testimony of a person who claims to be a refugee in Australia will need to consider, and in many cases consider sympathetically, possible explanations for any delay in the making of claims, and for any evidentiary inconsistencies, there is not a rule that a decision maker may not reject an applicant's testimony on credibility grounds unless there are no possible explanations for the delay or inconsistency … Nor is there a rule that a decision maker must hold a "positive state of disbelief" before making an adverse credibility assessment in a refugee case. …

16 But reservation is expressed as to whether there is any "*benefit of the doubt*" to be applied in Tribunal hearings: *SZNRZ v Minister for Immigration and Citizenship* [2010] FCA 107 at [19]. Reference was there made to the following observations of Beaumont J in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* ("*Randhawa*") (1994) 52 FCR 437 at 451:

> Proof of persecution in the context of an application for refugee status is a matter of some complexity. As A Grahl-Madsen has noted *(The Status of Refugees in International Law* at pp 145–146), in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for, since it is a well-known fact that a person who claims to be a refugee may have difficulties in proving his allegations (cf Gaudron J in Chan at 413); and it would go counter to the principle of good faith in the interpretation and application of treaties if a contracting state "should place on a suppliant a burden of proof which he, in the nature of things, could not possibly cope with". This should not, however, lead to "an uncritical acceptance of any and all allegations made by suppliants".
>
> In discussing the burden of proof, the *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) published by the Office of the United Nations High Commissioner for Refugees takes a similar position (at pp 47–49). Although limits on the use of the handbook in the interpretation of the treaty were indicated by Mason CJ in Chan (at 392), the Chief Justice went on to say (at 392) that he regarded the handbook "more as a practical guide for the use of those who are required to determine whether or not a person is a refugee".
>
> In that context, the handbook states:
>
> > "(2) Benefit of the doubt
> >
> > 203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.
> >
> > 204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."

Reference was there also made to views previously expressed in this Court that the Tribunal must be "*sensitive to the difficulties often faced by applicants and should give the benefit of the doubt to those who are generally credible, but are unable to substantiate all of their claims*": *SZLVZ v Minister for Immigration and Citizenship* [2008] FCA 1816 at [25] per Middleton J. In *Gholami v Minister for Immigration and Multicultural Affairs* [2001] FCA 1091 at [7], Tamberlin J referred to *Randhawa* and "*the liberal attitude concerning proof of persecution in the context of an application for refugee status*" there espoused by Beaumont J.

17 Whatever the scope may be, however, as to any "*benefit of the doubt*", it has little (if any) role to play where claims have been rejected upon the basis of an assessment of a claimant's credibility. The Tribunal is either satisfied as to a claimant's credibility or not so satisfied. If the Tribunal is not satisfied that claims to refugee status have been established, a claimant is not entitled to have his claims accepted simply by reason of the fact that there is a "*possibility*" that the "*claims are plausible*" or because he should be given a "*benefit of the doubt*".

18 In the present proceeding, the reasons for decision of the Tribunal dated 9 June 2009 record that it did not regard the now Appellant as "*a witness of truth*". Findings as to credibility, it has repeatedly been said, are findings of fact *par excellence*, entrusted to the Tribunal alone to make: *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1 at [67], 168 ALR 407 at 423; *SZLGP v Minister for Immigration and Citizenship* [2009] FCA 1470 at [34]. Reference was made in the reasons of the Tribunal to the Tribunal Member putting to the now Appellant the fact that the claims made in his protection visa application "*were very different from his claims before the Tribunal*". Reference was also made in those reasons to the competing versions of when he moved from one district within India to another. Those reasons thus state in part:

> [72] I put to the applicant that he had told the Tribunal that he left for District L in the mid 2000s, in his PVA he indicated that he moved to District L in a later year and in his Statutory Declaration stated he moved to District L in a later year still. He did not respond.

The Tribunal concluded that he "*created his claims in order to obtain the visa sought*" and the Tribunal Member referred to "*other inconsistencies and implausibilities that confirm my view that the applicant is not a witness of truth*". Six instances are thereafter set forth detailing these "*inconsistencies and implausibilities*". The findings made by the Tribunal were findings of fact open to it upon the evidence. Moreover, the Appellant was unable to identify those particular claims in respect to which the Tribunal purportedly "*entertained the possibility*" that they were "*plausible*".

19 Notwithstanding the manner in which the Federal Magistrate expressed at least some of his reasons for decision, it is otherwise apparent that the Federal Magistrate gave attention to the reasons and findings of the Tribunal and the grounds upon which the application was sought to be advanced in that Court. No appellable error is discernible in his reasons for decision.

20 The *Ground of Appeal* is without factual or legal merit.

21 Nor is there considered to be any real merit in the contention raised during the hearing today that the Appellant has previously been prejudiced by an inability to effectively present his case. The reasons for decision of the Tribunal expose a detailed consideration of the claims advanced. Those reasons also expose adverse findings as to credibility adequately based upon such evidence as was then available.

22 There is no reason why the Appellant should not pay the costs of the First Respondent.

23 After judgment was delivered, those appearing for the Respondent Minister properly suggested that an order then made should be varied. When judgment was delivered an order was made deferring the "*entry*" of the Orders until 23 March 2010. The objective was to extend to the Appellant an opportunity during which he could have the reasons for decision translated should he so wish. He would then be placed in a position whereby he could effectively consider whether he wished to make an application to seek special leave to appeal. In that regard, rule 41.02.1 of the *High Court Rules 2004* provides as follows:

> An application shall be filed within 28 days after the judgment below was pronounced.

Power is conferred upon this Court to fix the date upon which an order is to take effect. Order 35 r 3 of the *Federal Court Rules* thus provides as follows:

> A judgment or order shall take effect on the date on which it is pronounced or made, unless the Court orders that it take effect at an earlier or later date.

Given the difficulties in both securing an interpreter in Australia for the Appellant, and the difficulties experienced in translation during the course of the hearing, it is considered appropriate to exercise the discretion conferred by O 35 r 3 to provide that the Orders made previously be "*pronounced*" to take effect on 23 March 2010. Accordingly, Order 3 as made previously has been varied. The making of such an order, of course, says nothing as to whether or not such an application should be made and nothing as to prospects of success of any application.

ORDERS

24 The Orders of the Court are:

1. The appeal is dismissed.

2. The Appellant is to pay the costs of the First Respondent.

3. Orders 1 and 2 are to take effect as if pronounced on 23 March 2010.

4. All references as to the identity of the Appellant in the proceedings today are to be deleted from any transcript of the proceeding in accordance with s 91X of the *Migration Act 1958* (Cth).

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 10 March 2010