FEDERAL COURT OF AUSTRALIA

SZMFJ v Minister for Immigration and Citizenship (No 2) [2009] FCA 95

MIGRATION – application for a protection visa – appeal from Federal Magistrates Court upholding decision of Refugee Review Tribunal – conscientious objection to military service – political opinion – whether Tribunal asked the wrong question.

Held: appeal allowed

Migration Act 1958 (Cth)

Applicant VEAZ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1033
Erduran v Minister for Immigration and Multicultural Affairs (2002) 122 FCR; [2002] FCA 814
Minister for Immigration and Multicultural and Indigenous Affairs v VFAI of 2002 [2002] FCAFC 374
Minister for Immigration and Multicultural and Indigenous Affairs v WALU [2006] FCA 657
Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others (1996) 185 CLR 259
SZCBT v Minister for Immigration and Multicultural Affairs [2007] FCA 9
SZMFJ v Minister for Immigration and Anor [2008] FMCA 1155
SZMFJ v Minister for Immigration and Citizenship [2008] FCA 1815
VCAD v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1005
VCAD v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 1

SZMFJ v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 1369 of 2008

JAGOT J
16 FEBRUARY 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1369 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZMFJ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**JAGOT J**
DATE OF ORDER:	**16 FEBRUARY 2009**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. The orders made by the Federal Magistrates Court on 12 August 2008 are set aside.
3. The decision of the Refugee Review Tribunal made on 3 April 2008 is set aside.
4. The matter is remitted to the Refugee Review Tribunal for determination in accordance with law.

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 eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1369 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZMFJ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**JAGOT J**
DATE:	**16 FEBRUARY 2009**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal against an order of the Federal Magistrates Court dismissing the appellant's application for judicial review in connection with refusal of a protection (class XA) visa under s 65 of the *Migration Act 1958* (Cth) (*SZMFJ v Minister for Immigration and Anor* [2008] FMCA 1155). Under s 36(2) of the Act the criterion for a protection visa is that the applicant for the visa is (relevantly) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol (meaning, in accordance with s 5(1), the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees). Section 474 of the Act protects "privative clause decisions" (defined to include decisions with respect to protection visas) from challenge other than on the grounds of jurisdictional error.

2 The appellant is a citizen of Israel. He arrived in Australia on 12 November 2006. He applied for a protection visa on 8 November 2007. The first respondent's delegate refused the application on 29 November 2007. The appellant applied to the Refugee Review Tribunal for a review on 27 December 2007. The Tribunal affirmed the decision on 3 April 2008. The appellant appealed to the Federal Magistrates Court on 6 May 2008. The Federal

Magistrates Court dismissed the application on 12 August 2008 on the basis that it was open to the Tribunal on the available material to reach the conclusions it did.

3 On 2 September 2008 the appellant filed a notice of appeal to this Court from the orders of the Federal Magistrates Court. The matter came before Gray J for hearing on 19 November 2008. Gray J adjourned the hearing to enable the appellant to obtain legal representation after making the following observations (*SZMFJ v Minister for Immigration and Citizenship* [2008] FCA 1815 at [5] – [6]):

> **5** I take the law to be set out in my judgment in *Erduran v Minister for Immigration and Multicultural Affairs* [2002] FCA 814 (2002) 122 FCR 150 at [18]-[28]. That judgment was subsequently followed at first instance in *Applicant VCAD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1005. On appeal, the Full Court, at the very least, cited without disapproval the judgment in *Erduran*. See *VCAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 1 at [13] in the judgment of Gray J and at [33]-[34] in the joint judgment of Sundberg and North JJ.
>
> **6** The reasons for decision of the Tribunal in the present case are somewhat difficult to construe. There must be some considerable doubt as to whether the Tribunal addressed the two questions: whether conscientious objection to military service itself could amount to political opinion; and whether the differential application of a law, otherwise of general application, to persons with a particular political opinion could give rise to a well-founded fear of persecution for a Convention reason.

4 On 9 February 2009 the appellant filed an amended notice of appeal (and, at the hearing on 13 February 2009, I granted leave to the appellant to rely on this amended notice). In substance, the amended notice alleges that the Tribunal asked the wrong question (and thus constructively failed to exercise its jurisdiction) by failing to follow the process laid out in *Erduran v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR; [2002] FCA 814. This process is described in *Erduran* as follows:

> **28** It therefore appears that, when an issue of refusal to undergo compulsory military service arises, it is necessary to look further than the question whether the law relating to that military service is a law of general application. It is first necessary to make a finding of fact as to whether the refusal to undergo military service arises from a conscientious objection to such service. If it does, it may be the case that the conscientious objection arises from a political opinion or from a religious conviction. It may be that the conscientious objection is itself to be regarded as a form of political opinion. Even the absence of a political or religious basis for a conscientious objection to military service might not conclude the inquiry. The question would have to be asked whether conscientious objectors, or some particular class of them, could constitute a particular social group. If it be the case that a person will be punished for refusing to undergo compulsory military service by reason of conscientious objection stemming from political opinion or religious views, or that is

> itself political opinion, or that marks the person out as a member of a particular social group of conscientious objectors, it will not be difficult to find that the person is liable to be persecuted for a Convention reason. It is well-established that, even if a law is a law of general application, its impact on a person who possesses a Convention-related attribute can result in a real chance of persecution for a Convention reason. See *Wang v Minister for Immigration & Multicultural Affairs* [2000] FCA 1599 (2000) 105 FCR 548 at [65] per Merkel J. Forcing a conscientious objector to perform military service may itself amount to persecution for a Convention reason.

5 The hearing proceeded on 13 February 2009 on the basis of the following concession by the Minister:

> For the purpose of these proceedings, the first respondent [the Minister] concedes that the governing law is as set out in *Erduran v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 122 FCR 150; [2002] FCA 814 at [27] – [28].

6 As submitted on behalf of the appellant, although the Full Court reversed the decision in *Erduran* (*Minister for Immigration and Multicultural and Indigenous Affairs v VFAI of 2002* [2002] FCAFC 374) it did so on the basis that the transcript of the hearing before the Tribunal (not available in *Erduran*) disclosed that the Tribunal had dealt with the case put by the appellant. The Full Court did not disagree with the statements of principle in *Erduran* and those statements have been applied subsequently (*Applicant VEAZ of 2002 v Minister for Immigration and Multicultural Affairs* [2003] FCA 1033 at [21] – [22], *VCAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1005 at [33], *VCAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 1 at [34], and *Minister for Immigration and Multicultural and Indigenous Affairs v WALU* [2006] FCA 657).

7 The parties proceeded on the common basis that resolution of the appeal required the Tribunal's reasons to be considered but that, in so doing, over-zealous scrutiny with an "eye keenly attuned to the perception of error" should be avoided (citing *Minister for Immigration and Multicultural and Ethnic Affairs v Wu Shan Liang and Others* (1996) 185 CLR 259 at 271 – 272). The appellant also observed that this required consideration of the whole of the Tribunal's reasons rather than any assumption that "ambiguity in the Tribunal's reasons be resolved in the Tribunal's favour" (*SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 at [26]). Further, that this was not a case of ambiguity in the expression of reasons; rather, consideration of the whole of the Tribunal's reasons disclose that the

Tribunal misunderstood and misapplied the principles set out in *Erduran* and thus asked itself the wrong question.

8 The appellant's submissions involved the following steps:

(1) *Erduran* at [28] says that the non-discriminatory application of general laws to a conscientious objector may constitute Convention related persecution.

(2) Because of this, *Erduran* identified that in a case involving refusal to perform military service it was necessary first to make a factual finding whether the refusal arises from a conscientious objection and second to consider whether the conscientious objection arises from a political or religious opinion or might itself be a political opinion or whether the appellant might be the member of a relevant social group.

(3) The Tribunal referred to *Erduran* but misapplied it. In particular, the Tribunal's reasons disclose that the Tribunal understood that the non-discriminatory application of laws of general application to a conscientious objector could not engage the 1951 Convention if the conscientious objection is not "a significant and essential reason for motivating the persecutor to harm" the appellant. *Erduran* stands for a contrary proposition, namely, that the non-discriminatory application of laws of general application to a conscientious objector may itself constitute Convention related persecution.

(4) Other parts of the Tribunal's reasons support this inference of error. The Tribunal did not make a positive finding about the appellant's refusal to undergo military service as constituting a conscientious objection or not. Rather, the Tribunal appears to have assumed that the appellant was a conscientious objector. Such an assumption cannot be reconciled with a proper understanding of the reasoning in *Erduran*. Further, the Tribunal expressed itself in terms of the appellant's actual or imputed political opinions without reference to the possibility that the appellant's conscientious objection was itself a political opinion.

9 The Minister submitted that while the Tribunal's reasons do not precisely accord with the steps identified in *Erduran*, that sequential approach was not required. The Tribunal addressed the substance of the relevant issues. The Tribunal did not assume the appellant to be a conscientious objector but assumed his claims to be a fear of persecution by reason of his conscientious objection. It is implicit from the Tribunal's reasons that it did not accept that the appellant was a genuine conscientious objector. The Tribunal considered the issues of political opinions and social groups (being the only potential issues raised by the material). It did so by reference to both actual and imputed political opinions. As to the former, the Tribunal did not think the appellant's political opinions extended beyond his aversion to military service. As to the latter, the Tribunal was satisfied that the appellant would not be the subject of any adverse imputed political opinion. The Tribunal also did not consider that the material supported any finding of membership of any social group.

10 The Tribunal's reasons, considered as a whole, cannot be reconciled with the reasoning in *Erduran*. The Tribunal appears to have assumed that the non-discriminatory application of a law of general application is incapable of constituting persecution for any reason within the scope of the 1951 Convention. This assumption explains: - (i) the Tribunal's focus on finding some significant and essential motivator for the persecution separate and distinct from the application of the laws themselves, (ii) the lack of any finding by the Tribunal as to whether the appellant's aversion to military service was for the reason of conscientious objection, and (iii) the Tribunal's treatment of actual and imputed political opinions. Each of these aspects of the Tribunal's reasoning is contrary to the approach in *Erduran* which accepts that, depending on the particular facts found, the non-discriminatory application of a general law may constitute persecution for a reason within the scope of the 1951 Convention. Given the basis on which this appeal proceeded (as set out in [5] above) I consider that the Tribunal asked the wrong question and thus constructively failed to exercise its jurisdiction. Accordingly, the appeal must be allowed. I will hear the parties on the question of costs before this Court and the Federal Magistrates Court.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 16 February 2009

Counsel for the Appellant:	Mr B D O'Donnell
Counsel for the First Respondent:	Ms S A Sirtes
Solicitor for the First Respondent:	Clayton Utz

The Second Respondent did not appear

Date of Hearing:	13 February 2009
Date of Judgment:	16 February 2009