FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZHQO v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 746

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of decision not to grant protection visa – whether Tribunal failed to consider relevant material – writs of certiorari and mandamus issued.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.91S, 91X, 425

SZFNK v Minister for Immigration & Multicultural Affairs [2006] FCA 1601

First Applicant:	SZHQO
Second Applicant:	SZHQP
Third Applicant:	SZHQQ
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3920 OF 2006
Judgment of:	Scarlett FM
Hearing date:	8 May 2007
Date of Last Submission:	8 May 2007
Delivered at:	Sydney
Delivered on:	8 May 2007

REPRESENTATION

Applicant:	In Person
Counsel for the Respondent:	Ms McWilliam
Solicitors for the Respondent:	DLA Phillips Fox

ORDERS

(1) That there be an order in the nature of certiorari quashing the decision of the Second Respondent handed down on 5 December 2006.

(2) That an order in the nature of mandamus issue directing the Second Respondent to reconsider and determine the Applicants' application according to law;

(3) That there be no order as to costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3920 of 2006

SZHQO
First Applicant

SZHQP
Second Applicant

SZHQQ
Third Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application for review of a decision Refugee Review Tribunal, signed on 14th November and handed down on 5th December 2006. The Tribunal affirmed the decision of the delegate of the Minister not to grant the Applicants Protection (Class XA) visas. The Applicants are husband, wife, and adult son. There are two other adult children resident in Australia, who are not parties to this proceeding.

Background

2. The Applicants arrived in Australia on 24th June 2004, and applied for Protection (Class XA) visas on 30th November 2004. When their applications were refused the Applicants sought review of that decision

from the Refugee Review Tribunal. The Tribunal affirmed the delegate's decision and the Applicants sought judicial review of that decision from the Federal Magistrate's Court.

3. On 26th July 2006, I made orders by consent issuing a writ of certiorari and a writ of mandamus, and thereby returning the Applicant's application to the Refugee Review Tribunal. The invited the Applicants to attend a further hearing on 24th October 2006. The Applicants attended the hearing and all three of them gave evidence to the Tribunal. The Applicant's daughter, who was an adult, gave evidence about difficulties that she had had in Jordan with a man called, Ashraf. She had said that Ashraf had links with the Muslim brotherhood, and was able to protect her against them. The Applicants act by the Christian religion.

4. She had promised to marry Ashraf after she completed her university studies, but she did not do so and left Jordan for Australia, where she now lives. The Applicant's daughter told the Tribunal that Ashraf believes she betrayed him and she fears for her family if they are obliged to return to Jordan because Ashraf would use her family to try to lure her to go back.

The Tribunal's findings and reasons

5. The Tribunal affirmed the delegate's decision not to grant protection visas. The Tribunal accepted that the Applicants were nationals of Jordan. The Tribunal also accepted the following:

   a) that the First Applicant, the father, was reported to the authorities in Saudi Arabi, by an acquaintance named Ahmad for having bibles in his possession and that the Applicant was imprisoned for six months and tortured.

   b) that the Applicant's treatment in Saudi Arabi seriously and permanently impacted on his state of health and well being, and that Ahmad had informed members of the Muslim brotherhood in Zarqa, Jordan, about the Applicant's treatment in Saudi Arabi for being a missionary.

c) that following his return to Jordan between 1998 and 2004, the Applicant's father was visited on four separate occasion by member of the Muslim brotherhood, who asked him to convert to Islam. The Applicant was called an infidel and told that if he did not convert to Islam his life and family would be ruined.

6. The Tribunal also accepted that the Muslim brotherhood's verbal threats against the Applicant's family may have translated into verbal harassment and abuse of his wife and son. The Tribunal accepted that at some stage in 1999 or in 2000, acid was splashed at the Applicant wife and her daughter, from a moving car, though the wife and her daughter were not harmed.

7. The Tribunal did not, however, find itself satisfied that the Muslim brotherhood had any real interest in the Applicant husband, and it was not satisfied that the Applicant wife had been persecuted in the past for the reason of her religion. The Tribunal was also not satisfied the Applicant wife had been persecuted in the past for any other Convention reason, and it was not satisfied that she had been persecuted for Convention if she was to return to Jordan at that stage or any reasonably foreseeable future.

8. The Tribunal was also satisfied that if the Applicant husband and wife were to face harm by members in support of the Muslim brotherhood that effective and adequate State protection was available to them in Jordan. The Tribunal also noted, at page 173 of the Court Book, that it had considered the Applicant's son's experiences, and accepts that he too was harassed and verbally abused, but was not satisfied that those experiences amounted to persecution.

9. The Tribunal was also of the view that if the son wished to avoid harm and harassment that he faced in Zarqa, it was reasonable for him to relocate to Amman. The Tribunal was not satisfied that there was any real chance that the son would be pursued and found by the Muslim brothers in a relatively large city such as Amman.

10. The Tribunal also considered the claims made in respect of the person, Ashraf, and accepted that he was angry and resentful at the daughter for having reneged on a promise to marry Ashraf and having come to

Australia. Any retaliation, however, the Tribunal found would not be for a Convention reason.

11. The Tribunal, therefore, was not satisfied that the Applicants had a well founded fear of persecution for a convention reason and confirmed the delegate's decision.

The application for judicial review

12. The Applicants have sought judicial review of this decision from the Federal Magistrates Court. They were not legally represented in these proceedings and were not represented by a migration agent at the Tribunal hearing.

13. The application alleges jurisdictional error on the part of the Tribunal in the following way:

    a) failure to apply the law properly;

    b) failure to take evidence from all witnesses;

    c) failure to understand s.91S of the Migration Act.

14. The Applicants have also provided an affidavit annexing a copy of the Tribunal decision and asking the Court to look at, not only of the Tribunal decision, but also of the decision made in respect of other proceedings, which relate to the Applicants' adult daughter. The Applicants have also provided an affidavit to which a transcript of the hearing is annexed.

15. At the hearing the Applicants' adult daughter, who will not be named in order to protect the identity of the Applicants as required by s.91X of the Migration Act, asked the Court for permission to make a submission on behalf of her family. She is not a lawyer, but counsel for the Respondent Minister, Ms McWilliam, indicated that she had no objection to this course being followed, and I granted permission for the daughter to make a submission to the Court. She presented a written submission and also made submissions orally.

16. The thrust of the daughter's submission is that the Tribunal indicated that it would consider the decision I her case, having found it relevant

to the matters upon which the Tribunal was required to decide, but then did not do so. This is not a claim that was referred to specifically in the Applicant's application, but it was certainly a claim that was made at the hearing and counsel for the Respondent Minister was able to answer that claim.

17. The force of the claim in legal terms, perhaps, is an allegation of a failure to take relevant material into account, which if substantiated could constitute jurisdictional error.

18. Counsel for the Respondent Minister, Ms McWilliam, prepared a comprehensive submission which answers the contentions or the grounds contained in the application. Ms McWilliam submitted that in the first ground the Applicants appeared to complain about the outcome of the Tribunal's decision, rather than any reason within the decision, which is, in effect, an attempt to seek review of the merits of the decision which is not available on judicial review. In my view, that submission is correct.

19. Counsel for the Respondent Minister also submitted that the Applicant's second ground was misconceived, because the Tribunal did take evidence from all witnesses. The Applicants themselves, and the adult daughter gave evidence at the Tribunal hearing and the Tribunal referred to their evidence separately, individually, in the decision. But the Tribunal took notice of the evidence of the witnesses by its adoption of the material before the previous Tribunal.

20. The Tribunal referred at some length of the evidence before the previous Tribunal, and it was well established that evidence before a previous Tribunal can be taken into account at a second Tribunal. That submission, to my mind, is correct, as is the submission that in any event the Tribunal is not obliged to obtain evidence from a person nominated by the Applicant, even though it has the power to do so under s.426 of the Migration Act.

21. The Applicant's third ground relates to a claim that the Tribunal did not understand the requirements of s.91S of the Migration Act. Ms McWilliam submitted that s.91S provides that where a person claims persecution on the basis of membership in a particular social group, and the membership of the family, the claims are to be

disregarded if there is no convention nexus. She submitted that the Tribunal applied this section to the present case, and found that the harm feared was from Ashraf, and his motivation was perceived humiliation or revenge resulting from the daughter in the family reneging on her promise to marry him and moving to Australia. That was not a Convention reason and accordingly there is no way in the Tribunal's understanding or application of s.91S of the Migration Act. In my view, that submission is correct.

22. Finally, counsel for the Respondent Minister in her written submission pointed out to the Court that although there is no obligation to do so the Minister has given independent consideration to whether the Tribunal's statement of reasons gives rise to jurisdictional error, and that none could be discerned. The Tribunal invited the Applicants to a hearing. They were on notice of the issues under review, which ultimately because the reasons for the Tribunal's decision, and the Tribunal complied with its obligation under s.425 of the Migration Act.

23. It is correct to submit that the Court is under no obligation to give consideration to whether the Tribunal's statement of reasons gives rise to a jurisdictional error. Ms McWilliam referred the Court to the decision of Madgwick J *in SZFNK v Minister for Immigration & Multicultural Affairs* [2006] FCA 1601, which is an appeal from a decision of the Federal Magistrates Court.

24. In that case at [3] and [4], his Honour distinguished the decision in *Yo Han Chung v University of Sydney & Ors* [2002] FCA 186 on the facts relating to that decision. His Honour went on to say, however, at [5]:

> *In refugee cases it has become common for members of this Court, and of the Federal Magistrates Court, to run their eye over the materials lest, when so much might be at stake, an unrepresented applicant might either fail altogether to see an obviously arguable ground for the Court's intervention or, as Mr Johnson aptly put it, by the scatter gun approach commonly employed, aim at everything but the right point. In so doing, members of both courts act from a degree of charity and concern that Australia should not unlawfully deal with an asylum seeker, but there is no obligation on the members of those courts, in my opinion, to do so.*

25. The written submissions by counsel for the Minister contain an accurate summary of the law, and I adopt the reasons referred to it. There are, however, two other matters that are worthy of attention. One of them is that the Applicants, as I said, were not legally represented. They are not represented at the Tribunal hearing by the registered migration agent, nor were they represented by a lawyer at the proceedings before this Court.

26. It may well be that there are humanitarian grounds once legal proceedings have been completed. For the Applicants, certainly the parents, be considered for some other form of visa: an aged parent visa or a carer's visa. The Applicant father, I note, is now 62 years of age and it is clear that he is in very poor health. There is some medical evidence to that affect presented by the Tribunal and the Applicant father attended Court in a wheelchair to which he is apparently confined and as the Tribunal Member noted his speech was slurred and it appeared that he some cerebral impairment.

27. He is obviously not a well man. The fact that there are two adult children residing in Australia, from what I am told is on a permanent basis, is a matter that would need to be taken into account, and it may well be that if eventually claims for a protection visa are unsuccessful then a more experienced eye might see within these facts grounds for the Applicant parents being considered for some other form of visa, bearing in mind their age and their state of health, and the fact that they have some adult children residing in Australia, who are not parties to these proceedings.

28. Had the Applicants obtained the services of a registered migration agent, or had they been represented by a legal practitioner who has experience in this area, and there are some very capable practitioners, it may well be that these proceedings would be directed more towards considering the suitability of the Applicants for some other visa.

29. That said, I have given consideration to the claims made at the hearing by the Applicants' daughter that she had asked for her own circumstances to be taken into account and that she had submitted that the Tribunal indicated that it would do but did not do so.

30. In an oral submission, Ms McWilliam, of counsel, submitted that the Tribunal did do what it said that it would do, and she referred the Court to page 173 of the Court Book, where the Tribunal said:

> *The Tribunal has considered the claims forwarded in relation to Ashraf.*

And then went on to describe circumstances relating to that particular matter. Ms McWilliam submits that this is evidence that the Tribunal did consider in the circumstances of the Applicants' daughter's claim.

31. To consider this in context I refer to page 43 of the transcript, which was annexed to an affidavit. At page 43 the Applicants' daughter explained that she arrived in Australia approximately at the same time as her family and applied for her protection visa separately. The Tribunal Member then went on to ask:

> *Member: and when did you…what level was your case decided? Did the department decide your case or the Tribunal decide it?*
>
> *Applicant's Daughter: The Tribunal.*
>
> *Member: The Tribunal?*
>
> *Applicant's Daughter: Yes.*
>
> *Member: Do you have your case details with you?*
>
> *Applicant's Daughter: Actually no, but…*
>
> *Member: Do you have your case number or anything?*
>
> *(An interjection from Mr Toufic Lava who attended proceedings with the family)*
>
> *Mr Toufic: I can email it to you.*
>
> *Member: Ok you can fax that to the Tribunal.*
>
> *Applicant's Daughter: I think the case number is with me, is that gonna to help, the case number?*
>
> *Member: Yes, that would help.*
>
> *Applicant's Daughter: It's number 5/52636.*

32. The transcript then goes on to describe the Applicants' daughter, giving her name, and being asked about what she wished to say in support of the family's case, referring to Ashraf, and setting our her life history insofar as was relevant.

33. At the bottom of page 48 going onto 49, the transcript shows the Applicants' daughter saying to the Tribunal:

> *Applicant's Daughter: I want just to let you know, like in case my parents will go back to Jordan, their life would be at risk and danger, will be put to danger and because of me and I don't want this to happen.*
>
> *Member: I appreciate that… I still have to make my assessment on the bases that the reason behind any danger that your parents fear is a convention reason, I mean I understand that you may be concerned, you may be a reason but I mean not to be able to consider that, if I don't think it is one of the convention reasons or a significant reason behind the fear of your parent.*

34. Counsel for the Minister submitted that in that context the statement by the Tribunal Member, at page 173 of the Court Book, that the Tribunal had considered the claims forwarded in relation to Ashraf, can be interpreted as meaning that the Tribunal had considered the decision and the reasons for the decision in respect of the Applicants' adult daughter.

35. With respect, I do not agree. It is not clear from the text that that is the meaning of that particular statement. It is regrettable that the Applicants, if they wish the Tribunal to consider the Tribunal decision in respect of the adult daughter, did not have a copy of the Tribunal decision which could have been tendered to the Tribunal Member there and then.

36. Had the Applicants been represented at the hearing by a competent registered migration agent that may well have been the procedure followed. Unfortunately, the Applicants did not have that assistance. Nevertheless, in my view, the transcript at page 43 indicates an intention and an undertaking in some form given by the Tribunal Member to consider the reasons in the Tribunal decision relating to the

Applicants' daughter. It was, after all, the Tribunal Member who asked the Applicants' daughter whether she had the Tribunal reference to her case, and the daughter was able to provide that.

37. That clearly indicates some sort of an intention to consult that decision. Whether or not that would, in the long run, have affected the Tribunal decision in relation to the Applicants before the Tribunal it is not for me to predict. I am of the view, however, that that material was put to the Tribunal as being relevant and accepted, at least, prima facie by the Tribunal as being relevant, and I am not satisfied that the Tribunal decision record does show the Tribunal, in fact, considered the material which it appears to have said that it would.

38. As I said, in the long run, whether that would have provided any assistance to the Applicants or not is hard to judge. It is for that reason and for that reason alone that I am of the view that the Tribunal fell into jurisdictional error by failing to take relevant material into account. It is for that reason and that reason alone that I propose to grant the application for review. I will make some orders which have been prepared.

I certify that the preceding thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: V. Lee

Date: 18 May 2007