FEDERAL COURT OF AUSTRALIA

SZMKL v Minister for Immigration and Citizenship [2009] FCA 106

SZMKL v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 1779 of 2008

GRAHAM J
12 FEBRUARY 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1779 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZMKL**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **GRAHAM J**
DATE OF ORDER: **12 FEBRUARY 2009**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The Appellant pay the First Respondent's costs.

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.

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BETWEEN:	**SZMKL** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent** **REFUGEE REVIEW TRIBUNAL** **Second Respondent**
JUDGE:	**GRAHAM J**
DATE:	**12 FEBRUARY 2009**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The appellant, who is identified for the purpose of these proceedings as 'SZMKL', was born in Fuqing, in Fujian Province in the People's Republic of China, on 22 October 1969. She is married and has three children: a daughter born on 15 December 1987, a son born on 30 December 1989, and a daughter born on 16 December 1991.

2 On 8 March 2007, she obtained a passport from the People's Republic of China. On 2 August 2007, she secured an Australian student visa. She left the People's Republic of China on 30 August 2007 and arrived in Australia on 31 August 2007. On 12 October 2007, she lodged an application for a Protection (Class XA) visa. In that application, she claimed to fear harm from the Chinese Government if she were to return to China, because she had breached China's one child policy, and also engaged in the practice of Falun Gong in private.

3 Her application for a Protection (Class XA) visa was refused by a delegate of the Minister on 4 January 2008. On 11 February 2008, she applied to the Refugee Review Tribunal ('the Tribunal') for review of the Minister's delegate's decision. On the same day, namely 11 February 2008, the Tribunal wrote to the appellant's adviser, acknowledging

receipt of her application. In that letter, it was indicated that the Tribunal expected the appellant to immediately send it 'any documents, information or other evidence you want the Tribunal to consider.' No such documents, information, or other evidence were sent to the Tribunal. On 25 February 2008, the Tribunal wrote again to the appellant's adviser, informing her that the Tribunal was unable to make a favourable decision on the material before it, and that the Tribunal wished to extend an invitation to the appellant to give oral evidence and present arguments at a hearing on 3 April 2008. The appellant attended a hearing before the Tribunal on 3 April 2008, which lasted for almost two hours.

4 By a letter dated 12 May 2008 and sent to the appellant's adviser, the appellant was invited to attend the formal handing down of the Tribunal member's decision on 22 May 2008. The receipt of that letter was acknowledged by the appellant's adviser on 12 May 2008. The appellant's adviser then proceeded to forward a letter to the Tribunal, dated 18 May 2008, which provided:

> *'Please see the attached photos for* [SZMKL] *that she practiced Falun Gong at Parramatta Site.*
>
> *Hope these photos could help you consider her application.'*

5 Three photographs, which have been poorly reproduced in the appeal book at AB113-AB114, were apparently attached to the letter which the Tribunal received on 19 May 2008. On 19 May 2008, the Tribunal wrote again to the appellant's adviser, acknowledging receipt of the letter dated 18 May 2008 and indicating that 'The Member reviewing your case has considered this material.'

6 On 19 May 2008, the Tribunal member signed her Statement of Decision and Reasons. That decision was handed down by the Tribunal on 22 May 2008. By her decision, the Tribunal member affirmed the decision of the Minister's delegate not to grant the appellant a Protection (Class XA) visa. The Statement of Decision and Reasons of the Tribunal member included, under the heading 'Claims and Evidence', the following:

> '40. *The applicant confirmed that she was fined when she had had a third child, and she had to borrow money to pay the fine. The Tribunal asked the applicant if she had had any other trouble because of having had a third child. The applicant stated that her husband was called once and placed in detention, as they did not have enough money to*

> *pay the fine. However, he was released after the fine was paid. They did not have any more trouble about their third child after they paid the fine.'*

7 During the course of the appellant's submissions in this case, I directed her attention to this paragraph, and she acknowledged that she had no further trouble under China's one child policy after the fine had been paid. It is, perhaps, appropriate to refer to part of what was recorded by the Tribunal member in the following paragraph of her Statement of Decision and Reasons, namely:

> *'41. The Tribunal asked the applicant if there is any other reason why she fears returning to China. The applicant stated that she is frightened because she still does not have much money and she wants to stay in Australia. … The applicant stated that … if she returns to China, she would have nowhere to sleep or even a shower. … She does not see her husband often, as he works elsewhere. She was living with their two daughters but their house was in a terrible condition and her children have always lived in terrible conditions, which is why she wants to bring them to Australia. She borrowed money to send her son to Australia and she has to repay the money with interest. She is currently residing with her son, and he is only at high school.'*

8 On 17 June 2008, the appellant filed an application in the Federal Magistrates Court of Australia, seeking constitutional writ relief in respect of the decision of the Tribunal. The grounds contained in the application were as follows:

> *'1. Jurisdictional error has bee* [sic] *made.*
>
> *2. Procedural Fairness has been denied RRT did not take my evidence important. I did not receive any letter from RRT to explain the doubts on which they refused me.'*

9 Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of pre-judgment (see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [48]).

10 The application in the Federal Magistrates Court of Australia came before Scarlett FM on 15 September 2008. His Honour delivered his reasons for judgment on 28 October 2008, and ordered that the application be dismissed. He further ordered that the applicant pay the respondent Minister's costs, fixed in the sum of $5000.00. In the course of his reasons for judgment, the learned Federal Magistrate said at [54]:

> *'54. ... In my view, the Court should find that there was a breach of s.91R(3), but exercise the Court's discretion to withhold relief on the basis that no injustice has occurred.'*

11 In this appeal, the Minister has, by a Notice of Contention, challenged the finding that there had been a breach of s 91R(3) of the *Migration Act 1958* (Cth) ('the Act'). The appellant filed a Notice of Appeal in this Court, appealing from the whole of the judgment of Scarlett FM given on 28 October 2008. The grounds of appeal relied upon were as follows:

> *'1. Refugee Review Tribunal had bias against me and did not make fair decision for my application.*
>
> *2. I need more time to borrow money to get a lawyer to represent me. But the Judge dismissed my case on my hearing date. It is not fair. I am Falun Gong Practitioner. I will be persecuted if I return to China.*
>
> *3.1 I believe that my application was not considered reasonably by the Judge at the Federal Magistrates Court and RRT.'*

12 When asked to address the Court on the allegation of bias contained in the first ground of appeal the appellant's response was to the effect: 'Because I am a Falun Gong person I cannot go back to China. I don't want to go back to my own country.' The issue of bias need not in the circumstances be addressed in any detail. Apart from other considerations, no suggestion of bias was raised when the matter was before the learned Federal Magistrate.

13 The state of mind described as bias in the form of pre-judgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented (see per Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [72]). The appellant's case based upon alleged bias is quite without foundation.

14 In relation to the second aspect of the first ground of appeal the appellant was invited to address the Court on her claim that the Tribunal did not make a fair decision regarding her application. Her submissions were to the effect that some people who have practised Falun Gong have been granted Australian visas. She said that she practised Falun Gong as well and asked rhetorically, 'Why not me?' If I understood her correctly she was saying that as a Falun Gong practitioner she should have been permitted to stay in Australia.

15 No jurisdictional error on the part of the Tribunal was suggested. Needless to say this Court is not able to offer a merits review of the decision which the Tribunal reached.

16 In the Findings and Reasons section of the Tribunal member's Statement of Decision and Reasons, she said amongst other things:

> '*54. The applicant claims that she left China because the Chinese Government will persecute her as … she practices Falun Gong in private.*
>
> *55. However, the Tribunal is not satisfied that the applicant is a Falun Gong practitioner. …*
>
> …
>
> *58. The Tribunal found the applicant's evidence about her practice of Falun Gong vague and lacking in credibility. …*
>
> *59. The applicant claims that she suffered no consequences as a result of her practice of Falun Gong but she is now frightened that her practice of Falun Gong in Australia will become known to the authorities in China and this will result in her persecution. …*
>
> *60. The Tribunal has considered the letter that the applicant provided … and the 3 photos that the applicant provided after the hearing. … the Tribunal is of the view that the applicant only began attending the Falun Gong practice at Parramatta Town Hall after she was invited to appear before the Tribunal, in order to strengthen her claims to be a refugee. …*
>
> *61. … the Tribunal does not accept that the applicant has been a genuine Falun Gong practitioner in Australia. …*
>
> *62. … The Tribunal is satisfied that the applicant only attended the Falun Gong practice at Parramatta Town Hall in order to strengthen her claim to be a refugee and the Tribunal has therefore disregarded this conduct.*

> *63. The Tribunal is also not satisfied that the applicant's attendance at Parramatta Town Hall would become known to the authorities in China or that she would be perceived by the authorities as a Falun Gong practitioner. The applicant expressed concern the Chinese authorities would become aware that the applicant had practised Falun Gong because there are fellow practitioners from her home town at the Parramatta Town Hall practice. However, the applicant provided no detail or elaboration as to why she has such a concern and the Tribunal finds the claim that fellow practitioners from her home town might somehow notify the Chinese authorities of the applicant's Falun Gong practice to be far fetched and fanciful.*
>
> *64. The Tribunal is not satisfied that the applicant is a Falun Gong practitioner. The Tribunal does not accept that the applicant has suffered serious harm in China as a result of being a Falun Gong practitioner. The Tribunal does not accept that the applicant would practice Falun Gong on return to China. Nor does the Tribunal accept that if the applicant returns to China now or in the reasonably foreseeable future, that there is a real chance that the applicant will be persecuted for reasons of her real or imputed religious beliefs or her membership of any particular social group for the purposes of the Convention on the basis of her claimed involvement with Falun Gong. The Tribunal also does not accept that the applicant would practise Falun Gong upon her return to China.*
> *…'*

17 The Tribunal did not accept that the appellant had been harmed in the past nor did the Tribunal accept that there was a real chance that she would be harmed for a Convention reason were she to return to China now or in the reasonably foreseeable future. The Tribunal member was not satisfied that the appellant was a person to whom Australia had protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (collectively referred to as 'the Convention').

18 Section 65 of the Act relevantly provides:

> *'65(1) After considering a valid application for a visa, the Minister:*
>
> *(a) if satisfied that:*
>
> *…*
>
> *(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; …*
>
> *… is to grant the visa; or*

(b) if not so satisfied, is to refuse to grant the visa.'

19 The relevant criterion for the grant of a protection visa to which s 65(1)(a)(ii) refers is to be found in s 36(2) of the Act, which relevantly, for present purposes, provides as follows:

'36(2) A criterion for a protection visa is that the applicant for the visa is:

(a) 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; …'

20 As was said by Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ in *NAGV and NAGW (2002) v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at [32]:

'[32] … Section 36(2) does not use the term "refugee." But the "protection obligations under [the Convention]" of which it does speak are best understood as a general expression of the precept to which the Convention gives effect. The Convention provides for Contracting States to offer "surrogate protection" in the place of that of the country of nationality of which, in terms of Art 1A(2), the applicant is unwilling to avail himself. That directs attention to Art 1 and to the definition of the term "refugee".'

21 The question of who answers the description of a 'refugee' is relevantly determined by Art 1 of the Convention which relevantly provided:

'A. For the purposes of the present Convention, the term "refugee" shall apply to any person who;

…

(2) … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence … is unable or, owing to such fear, is unwilling to return to it.'

22 The obligations of Australia under the Convention are qualified in part by s 91R of the Act. Relevantly for present purposes s 91R (3) of the Act provides as follows:

> *'91R (3) For the purposes of the application of this Act and the regulations to a particular person:*
>
> *(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention, as amended by the Refugees Protocol;*
>
> *disregard any conduct engaged in by the person in Australia unless:*
>
> *(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol."*

23 It is significant that s 65(1)(a) of the Act uses the word 'satisfied' and s 91R(3)(b) uses the word 'satisfies'.

24 In relation to conduct said to have been engaged in by a person in Australia the obligation of the Minister, the Minister's delegate and the Tribunal to 'disregard' the same cannot be complied with unless and until the Minister, delegate or Tribunal has firstly addressed whether or not conduct was engaged in by the relevant person in Australia and secondly, whether that conduct, if any, was engaged in 'otherwise than for the purpose of strengthening the person's claim to be a refugee' within the meaning of the Convention. The obligation to disregard is dependent upon the person in question having failed to satisfy the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening that person's claim to be a refugee.

25 There is no substance in the second limb of the appellant's first ground of appeal. The fact that some people practising Falun Gong may have been granted visas to stay in Australia is no reason why the Tribunal should be satisfied that the criterion specified for a Protection (Class XA) visa had been satisfied in the case of the appellant.

26 The findings of the Tribunal member as recorded above have not been shown to be affected by any jurisdictional error.

27 When asked to address the Court in respect of her second ground of appeal the appellant made responses which suggest that she had no association with the terms of the ground as expressed. She asked the Court to explain to her what it was that she had said. When asked whether the Notice of Appeal bore her signature, the appellant indicated that she said something before and now she had forgotten it.

28 There was no occasion for the learned Federal Magistrate to adjourn the hearing of the application which was before him.

29 In relation to ground of appeal 3, the appellant was invited to address the Court on the question of whether her application for review had not been considered reasonably by the Tribunal and whether her application to the Federal Magistrates Court of Australia had not been considered reasonably by the learned Federal Magistrate. Her response to a question as to what she wished to say about those matters was, 'I don't know.' When asked whether she had anything else to say in support of her Notice of Appeal her answer was in the negative.

30 In relation to the application of s 91R(3) of the Act to the circumstances of this case I would respectfully disagree with the conclusion of the learned Federal Magistrate that a breach of s 91R(3) by the Tribunal should be found. It seems to me that when the Tribunal member concluded that the appellant only began attending the Falun Gong practice at Parramatta Town Hall 'in order to strengthen her claims to be a refugee' (see paragraph 60) and continued by saying 'The Tribunal is satisfied that the applicant only attended the Falun Gong practice at Parramatta Town Hall in order to strengthen her claim to be a refugee, and the Tribunal has therefore disregarded this conduct' (see paragraph 62), the Tribunal was demonstrating an understanding of s 91R(3). It seems clear to me that the Tribunal member addressed whether or not conduct was relevantly engaged in by the appellant in Australia forming the view that some such conduct was engaged in at the Parramatta Town Hall, but was not satisfied that the appellant engaged in such conduct otherwise than for the purpose of strengthening her claim to be a refugee within the meaning of the Convention.

31 In the circumstances, the Tribunal member rightly recorded that the Tribunal was obliged to disregard the conduct in question.

32 In my view, paragraph 63 of the Tribunal member's Statement of Decision and Reasons was in the nature of a belt and braces exercise, where she was addressing an 'if I wrongly decided the satisfaction issue arising under s 91R(3)(b)' situation. In such circumstances, the Tribunal member was of the view that the appellant's activities at the Parramatta Town Hall would not come to the attention of the Chinese authorities so as to place her in a particular social group of non Falun Gong practitioners who may be thought to be Falun Gong practitioners, and, thus, within a permissible class of refugees to which the Convention might apply if the appellant had the requisite well-founded fear of being persecuted by reason of her membership of such a group.

33 Were it necessary for me to do so, I would agree with the learned Federal Magistrate that, in the exercise of the Court's discretion, relief should be refused to the appellant. However, there was, in my view, no contravention of s 91R(3) which would require the Court to address the question of discretion in any event.

34 In my opinion, the appeal should be dismissed.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Graham.

Associate:

Dated: 17 February 2009

The Appellant appeared in person

Counsel for the First Respondent:	G R Kennett
Solicitor for the First	DLA Phillips Fox

Respondent:

The Second Respondent filed a submitting appearance

Date of Hearing: 12 February 2009

Date of Judgment: 12 February 2009