FEDERAL COURT OF AUSTRALIA

SZHWI v Minister for Immigration and Multicultural Affairs [2007] FCA 900

SZHWI v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS AND REFUGEE REVIEW TRIBUNAL
NSD 31 OF 2007

ALLSOP J
15 JUNE 2007
SYDNEY

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 31 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZHWI**
Appellant

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **ALLSOP J**

DATE OF ORDER: **15 JUNE 2007**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Magistrates Court made on 21 December 2006 be set aside, and in lieu thereof it be ordered:
   (a) that there be an order in the nature of certiorari to quash the decision of the second respondent made on 9 November 2005 and handed down on 29 November 2005;
   (b) that there be an order in the nature of mandamus requiring the second respondent to review according to law the decision of the delegate of the first respondent to refuse the protection visa sought by the applicant; and
   (c) that the first respondent pay the costs of the applicant before the Federal Magistrates Court.
3. The first respondent pay the appellant's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

NO QUESTION OF PRINCIPLE

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 31 OF 2007**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZHWI** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**ALLSOP J**
DATE:	**15 JUNE 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal form orders of the Federal Magistrates Court (the "FMC") dismissing, with costs, an application for judicial review of a decision of the Refugee Review Tribunal (the "Tribunal") dated 9 November 2005 and handed down on 29 November 2005, that affirmed a decision of a delegate of the first respondent not to grant a protection visa.

2 The claims of the appellant were enunciated in his protection visa application and at the hearing before the Tribunal. The Tribunal described his background and claims at pp 4-5 of its reasons, as follows:

> *In his primary application the applicant states that he is a 31 year old married Hindu Nepalese who was born and always lived in Dapcha Kaure before he arrived in Australia in June 2005. He completed 12 years of schooling in 1987 and worked as a social worker at the Nepalese embassy in Bangkok from 2001 to June 2005.*
>
> *The applicant claims he fears harm from Maoist rebels who wish to extort money from him for the reason of his perceived wealth.*
>
> *In his oral evidence to the Tribunal, the applicant stated that he had worked*

in the Nepalese Embassy in Bangkok from 2001 until 2005 as a social worker. He said he would return annually to Nepal for a few days. He said that in 2005, prior to coming to Australia, he had returned for a week to Kathmandu but had stayed indoors with relatives.

The Tribunal asked him what he feared were he to return to Nepal. He stated that his life is "under threat". He said the Maoists kidnapped his children (now aged 6 and 4) three years ago and kept them for a week demanding money. He said that he agreed to pay them in a month's time and they released the children but in fact he did not have the money and has lived in fear ever since that they would again harm him or the children. He was asked if he feared anything else and he replied only the Maoists demanding money from him.

The Tribunal discussed with the applicant the need for the reason for the harm feared to be the essential and significant reason and that extortion is not a Convention reason. The applicant said that when he was a student he had spoken out against the Maoists. The Tribunal said that it found it hard to believe that the Maoists at present would be aware of this and he agreed.

The Tribunal then discussed the independent evidence cited below on the right of Nepalese to live in India. He replied that he would find it hard to live in India because there are many Nepalese Maoists there. The Tribunal stated that the independent evidence indicates that Nepalese Maoists are forcibly returned to Nepal by the Indian authorities.

The applicant concluded his evidence by stating that his problem is with the Maoists and "not with anything else".

3 The findings and reasons of the Tribunal were brief at pp 9-10 of its reasons and can be set out in full, as follows:

The applicant claims to fear harm from the Maoists whom he claims kidnapped his children and demanded money which he promised to pay but has not been able to.

He further claims that for him to live in India is not an option given the prevalence of Maoists there.

The Tribunal accepts the independent evidence cited above that the political situation in Nepal is currently marked by violence and instability and that the Maoists and the military have committed human rights abuses and have targeted those whom they consider to be their enemies.

The Tribunal finds that there is no Convention reason for the harm feared by the applicant. The Tribunal finds that the essential and significant reason for any harm the applicant fears from Maoists is that of extortion or monetary gain and hence the applicant's claims do not engage the provision of the

Convention.

That being so, the Tribunal does not accept that there is a real chance the applicant will face serious harm for a Convention reason were he to return to Nepal.

In the light of the above findings, the Tribunal finds the applicant does not have a well founded fear of persecution in Nepal.

For the sake of completeness, the Tribunal further finds that the applicant has a right to enter and reside in India as have large numbers of Nepalese currently living in India. The Tribunal does not accept the applicant's submission, and has no evidence to support such a submission, that there are large numbers of Nepalese Maoists in India. Indeed, the Tribunal notes that the independent evidence indicates that Nepalese Maoists, if discovered by the Indian authorities, are not permitted to remain in India and are forcibly returned to Nepal. The applicant has a record of employment that indicates he could indeed find employment in India, as have many thousands of Nepalese. The Tribunal finds that the applicant does not have a well-founded fear of being persecuted for a Convention reason in India, or of being returned from that country to Nepal. Accordingly, Australia does not owe protection obligations to the applicant: s.36 of the Act.

Conclusion

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant does not satisfy the criterion set out in s.36(2) of the Act for a protection visa.

4 The amended application before the FMC contained three particulars of a failure to carry out its statutory duty:

(1) An asserted breach of s 424A of the *Migration Act 1958* (Cth) (the "Act");

(2) An asserted failure to consider whether there was effective state protection from the fear that the appellant felt from Maoists; and

(3) An asserted failure to consider whether the appellant's fear of being persecuted for reasons of membership of a particular social group being Nepalese people of perceived wealth.

5 The Federal Magistrate also dealt with a particular in another document, also before

the FMC, and also called an amended application, that the Tribunal failed to consider all aspects of his claim being "my political opposition to Maoists."

6 The Federal Magistrate also considered the way the Tribunal dealt with s 36(3) of the Act, which provision is in the following terms:

> *Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.*

7 The appellant relied upon written submissions before the FMC. The amended application before the FMC revealed some acquaintance of the author of the document with the relevant principles governing the operation and administration of the Refugees Convention.

8 The Notice of Appeal to this Court was handwritten and the ground of appeal were expressed in the following terms:

> *There is a cleare legal error in the decision well found fear of persecution was defined and applied incorrectly.*
> *# Tribunal did not take into account of all aspects of my claim.*
> *# Tribunal's decision was made negligenty which caused me not getting my nature justic.*
> *# I am not fully satisfy and produre of making decision was not fair.*
>
> (reproduced without alteration or correction)

9 The appellant filed no written submissions. When called upon at the appeal to say anything in support of his appeal, he said the following through an interpreter:

> *My documents were lost, so I had to seek for new documents. I went to the RRT and the RRT expressly said to me that I have to go to India, and RRT kept reiterating that I can stay at least for four years in India, and in relation to that decision by the RRT I made my application to the Federal Court. If I had $3000 with me I would have been able to hire a lawyer to fight my case, but as it was, that the Federal Magistrates Court imposed $6000 fine on me, and I believe that the Federal Magistrates Court did not take into proper consideration of my application, and this is why I have submitted or re-submitted my application to the Federal Court. I do not actually have all the documents necessary, and the Federal Magistrates Court also has stated that I have to go to India, but I worked in the Nepalese Embassy in Bangkok for*

> *four years as a social worker, and I could not stay in Thailand, and how can I possibly go and stay in India.*
>
> *If my application had not been accepted in the first place, I would have been perhaps gone to other countries where there are human rights, and I cannot possibly go back to my country, and I cannot think about alternatives of going to other countries and, your Honour, I am faced with all those difficulties, and apart from that, your Honour, I have really nothing else to say.*

10 It is necessary to deal with each aspect of the reasoning of the Federal Magistrate. I have been assisted in that task by the careful and helpful submissions of Ms Clegg who appeared for the first respondent.

The asserted breach of s 424A

11 The Federal Magistrate, correctly, in my view, concluded that there was no breach of s 424A. The Tribunal in its reasons used information provided by the appellant to the Tribunal and country information. The former is covered by s 424A(3)(b); the latter is covered by s 424A(3)(a): *Minister for Immigration and Multicultural and Indigenous Affairs v NAMW* (2004) 140 FCR 572; *WAJW v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 330; *QAAC of 2004 v Refugee Review Tribunal* [2005] FCAFC 92; *VHAP of 2002 v Minister for immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 82; and *VJAF v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 178.

The asserted failure to consider effective state protection

12 The Federal Magistrate, correctly, in my view, reasoned that once the Tribunal had concluded that there was no Convention reason for the harm feared by the appellant form the Maoists, there was no requirement to consider the question of state protection. As a matter of logic that must be so.

13 The difficulty lies in the question whether the Tribunal correctly addressed the issue of the Convention.

The issue of particular social group

14 The Federal Magistrate stated the following in [34]-[36] of his reasons:

> *The First Respondent submitted and I accept, however, that in the present case the Tribunal made a finding of fact that this was a simple matter of extortion which would not therefore involve a protection obligation. I further accept that applying the authority of* NABE (No 2) v Minister for Immigration and Multicultural Affairs *(2004) 219 ALR 27 that the Tribunal is not obliged to consider unarticulated claims or claims which do not clearly arise from the material before it.*
>
> *I accept the submission of the First Respondent that this is not a case where the Applicant claimed to be part of a social group of Nepalese persons of perceived wealth targeted by Maoists.*
>
> *A proper reading of the claim made by the Applicant referred to earlier in this judgment reveals that essentially the claim was based upon his own personal or perceived wealth and not the membership of a social group. The Tribunal, I accept, had before it country information revealing that extortion occurred by the Maoists but was indiscriminate and not directed at any particular social group.*

15 With respect, I cannot agree with this approach. The facts as put forward throw up the issue whether or not there might be a particular social group. The facts were sufficient in their clarity in my view to require the Tribunal to consider whether the attempted extortion of someone with money and the fear of returning, having failed to pay, was a criminal act against an individual or conduct directed at him because he fell within some particular social group (the nature and extent of that particular social group being a question of fact for the Tribunal). The Tribunal did not address those questions. The answer is not clear to me. The addressing of the question is a matter for the Tribunal, not the Court. In my view, the Tribunal failed to complete its jurisdictional task.

The issue of political opinion

16 The Federal Magistrate dealt with this at [38]-[52]. The primary argument put before the FMC was that by refusing the extortion demand the appellant would be regarded as having a political opinion different from the Maoists and would thereby have an imputed political opinion which would be the basis for a fear of harm from the Maoists.

17 The Federal Magistrate referred to this as "far more problematic for the first respondent", and said at [48]:

> *… whilst the Tribunal may have regard to independent country information concerning the indiscriminate extortion of Maoists, it is clear that the*

> *Applicant was entitled to raise, as he apparently did raise, either directly or by inference, that his refusal to pay extortion demands may have resulted in an imputed political opinion.*

18 The reasoning of the Federal Magistrate leading to his rejection of this as a basis for a conclusion of error in the Tribunal is found in [51] and [52] of his reasons, as follows:

> *Having regard to the manner in which the claim was made, namely, that the Applicant was targeted for his personal wealth, and the other material before the Tribunal including the independent country information, it is my concluded view that the Tribunal, whilst not directly addressing the imputed political opinion based on the matters raised above, has reached a decision on the facts reasonably open to it, free from any error.*
>
> *Once it had decided that this was an extortion attempt by a political group which was part of an indiscriminate extortion campaign based on the personal wealth of the Applicant, it did not in my view need to consider in further detail any social group or indeed the imputed political opinion of the Applicant in refusing extortion demands which may of itself place him in a particular social group. Accordingly I do not detect any error which would permit me to allow this ground, and therefore this ground also should fail.*

19 With respect, if the Tribunal has not directed itself to an aspect of the claims (the possible imputed political opinion of the appellant arising from his refusal to comply with the extortion demand), that failure to complete its task is not cured by reaching a conclusion that he was targeted for his personal wealth. That may be, but the point that was open to be made was that the failure to pay (irrespective of the original reasons for targeting him) would lead to a political opinion being imputed to him.

20 Although I think that the reasoning of the Federal Magistrate was flawed at this point, it is less than clear that this claim was clearly raised by the facts, as the particular social group question was. Since I am of the view that the Tribunal failed to complete its statutory task in respect of the issue of a particular social group, I need not draw a final conclusion about this question of imputed political opinion.

Section 36(3)

21 The above conclusion as to the failure by the Tribunal to address the question of particular social groups would ordinarily lead to relief. Relief will, however, be withheld if the decision maker was bound by the statute to come to the conclusion that he or she did: *Re*

Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 at [58] and the cases there cited, and *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26.

22 Involved in that conclusion is a requirement of a degree of clarity in the conclusion that there was a clear independent basis for the Tribunal coming to the same conclusion.

23 Here, the difficulty in being satisfied that the Tribunal adequately addressed s 36(3) is that it failed to address one of the elements of s 36(3): that the appellant had not taken all possible steps to avail himself of a right to enter India. The answer to this in the submission of the first respondent was that it was not an issue. The Tribunal decision in the second last paragraph cited above reflects a discussion about living in India. It was submitted that it could be inferred that if the appellant had taken all possible steps he would have told the Tribunal that he had done so. Whilst there is some force in this argument, I am not prepared to conclude that if the Tribunal had directed enquiry to this issue the answer would be that he had not taken all possible steps to go to India. What was possible in the circumstances of the appellant leaving Nepal is a matter of which I am ignorant. This conclusion is not to contradict *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 in relation to the obligation to give reasons. The question is whether I can be confident that the failure by the Tribunal to address an element of s 36(3) can be excused because it was effectively conceded or not in issue. I am not able to draw that conclusion.

24 In these circumstances I am not prepared to withhold relief because of the operation of s 36(3).

25 This conclusion as to the failure by the Tribunal to deal with this element of s 36(3) makes it unnecessary for me to deal with the non-straightforward question of the nature of the "right" contemplated by s 36(3) and whether the Tribunal adequately dealt with the issue. In this regard, if I may say so once again, Ms Clegg's submissions on the relevant authorities (*Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154; *V856/00A v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 408; *V872/00A v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 57; *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 269; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664 at [19]-[20]; *SZFKD v Minister for Immigration and Multicultural Affairs and Anor*

[2006] FMCA 49; *SZEAS v Minister for Immigration and Multicultural Affairs and Anor* [2005] FMCA 1776) were lucid and helpful. They reveal an issue which may require authoritative resolution.

26 In the circumstances, the orders of the Court will be:

1. The appeal be allowed.

2. The orders of the Federal Magistrates Court made on 21 December 2006 be set aside, and in lieu thereof it be ordered:

   (a) that there be an order in the nature of certiorari to quash the decision of the second respondent made on 9 November 2005 and handed down on 29 November 2005;

   (b) that there be an order in the nature of mandamus requiring the second respondent to review according to law the decision of the delegate of the first respondent to refuse the protection visa sought by the applicant; and

   (c) that the first respondent pay the costs of the applicant before the Federal Magistrates Court.

3. The first respondent pay the appellant's costs of the appeal.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 15 June 2007

Appellant appeared in person with the assistance of an interpreter

Counsel for the Respondent: Ms L Clegg

Solicitor for the Respondent: Clayton Utz

Date of Hearing: 3 May 2007

Date of Judgment: 15 June 2007