

Minister for Immigration and Citizenship v SZMDS & Anor ([2010] HCA 16) Case Summary [2010] HCASum 15 (26 May 2010)

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MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZMDS & ANOR [2010] HCA 16

A majority of the High Court held today that the reasons of the Refugee Review Tribunal ("the Tribunal") for rejecting a Pakistani citizen's claim to fear persecution on the ground of his homosexuality were not illogical or irrational so as to give rise to a jurisdictional error.

The first respondent arrived in Australia on 3 July 2007 and applied for a Protection (Class XA) visa on 16 August 2007 on the basis of his fear of persecution in Pakistan due to his homosexuality. A delegate of the Minister for Immigration and Citizenship refused his application and the Tribunal affirmed the delegate's decision.

Although a citizen of Pakistan, the first respondent had largely resided in the United Arab Emirates ("the UAE") from 2004, before seeking protection in Australia. He claimed that, whilst in the UAE, he developed an attraction to members of the same sex and commenced a relationship with another male. He also claimed that he and that male then commenced a relationship with a third man. That relationship ended after the third man bashed and threatened the other two when confronted over certain issues.

The Tribunal was not satisfied that the first respondent was in fact a homosexual who feared persecution for two key reasons. The first was his return to Pakistan for three weeks in May-June of 2007 and the second was his failure to seek asylum when he briefly visited the United Kingdom in 2006. The Tribunal found that these two actions were inconsistent with the first respondent's claim to fear persecution in Pakistan.

The first respondent was unsuccessful in his appeal to the Federal Magistrates Court but was successful in a further appeal to the Federal Court (Moore J). The Federal Court found that the Tribunal fell into jurisdictional error by reaching a conclusion on illogical and irrational grounds. The *Migration Act 1958* (Cth) ("the Act") requires the Minister, their delegate, or the Tribunal upon review of a decision, to either refuse or

to grant a visa depending on whether or not they are "satisfied" that the conditions for that visa are met. Moore J held that the Act requires the Minister, their delegate, or the Tribunal, to come to that state of satisfaction on, amongst other things, logical and rational grounds. Failure to do so amounts to a jurisdictional error, reviewable by a court. His Honour found that the Tribunal's reasoning was illogical and irrational in that it assumed others in Pakistan would discover that the first respondent was a homosexual during the brief period of his visit without making findings as to how that could be and that, in light of the first respondent's explanation, there was no logical connection between his failure to apply for protection in the United Kingdom and his fear of persecution in Pakistan.

An appeal by the Minister to the High Court was successful. By majority, the Court held that it was open to the Tribunal to reject the first respondent's claimed fear of persecution on the grounds that it did. Even though reasonable minds may differ as to whether the first respondent's conduct was such as to be inconsistent with his claimed fear, this alone was not enough to suggest that the reasoning of the Tribunal was so illogical or irrational as to amount to a jurisdictional error.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*