FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXPA v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 1619

MIGRATION – Application for judicial review of decision of Refugee Review Tribunal – alleged jurisdictional error – allegations of bias considered.

Migration Act 1958, s.424A

MZXHY v Minister for Immigration and Citizenship [2007] FCA 622
NASB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 24
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
SFGB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 231

Applicant:	MZXPA
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	MLG 174 of 2007
Judgment of:	Burchardt FM
Hearing date:	11 September 2007
Date of last submission:	18 September 2007
Delivered at:	Melbourne
Delivered on:	12 October 2007

REPRESENTATION

Counsel for the Applicant:	Mr J. Gibson
Solicitor for the Applicant:	Erskine Rodan & Associates
Counsel for the First Respondent:	Mr R.C. Knowles
Solicitor for the First Respondent:	Clayton Utz

ORDERS

(1) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 15 January 2007.

(2) A writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.

(3) The First Respondent shall pay the Applicant's costs fixed in the sum of $6,000.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 174 of 2007

MZXPA
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The Applicant is a Lebanese national born on 5 July 1943. He seeks judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") dated 15 January 2007.

2. Although his application filed on 19 February 2007 contains three grounds, ground 2 was expressly abandoned before the Court.

3. Two grounds remain. The first is that the Tribunal's decision was affected by apprehended bias. Ground 3 is that the Tribunal erred in finding that there were other anti-Syrian groups of a secular nature in existence in Lebanon for many years, in circumstances where there was no evidence to support such a finding. The Applicant sought to bring into evidence before the Court an affidavit from Professor Michael Humphrey of the University of Sydney which was designed to support this approach to the evidence.

4. Counsel for the First Respondent objected to the receipt of Professor Humphrey's report. Argument was heard on this point first, not least

because counsel for the Applicant conceded that if Professor Humphrey's affidavit was not admitted into evidence, he would not proceed with ground 3 in the application.

5. The authorities to which I have been referred seem to me to establish three relevant propositions:

   a) save in cases where misconduct or bias or the like is alleged, as a general proposition it is not possible to admit new evidence in a hearing of an application for judicial review such as this one (see *MZXHY v Minister for Immigration and Citizenship* [2007] FCA 622 at [8]);

   b) even where new evidence is to be admitted, the party seeking to adduce it must show that it could not with reasonable diligence have been adduced in trial, and the evidence must be such that very probably the result would have been different (*NASB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 24 at [42] - [43]);

   c) notwithstanding a) and b), where the Tribunal purports to make a finding of fact which is essential to its reasoning process (referred to on occasions as a jurisdictional fact), and there is no evidence to support the finding, then this may well constitute a jurisdictional error (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at [355]-[357], applied and analysed in *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 231 at [19] - [20]).

6. In this case, Professor Humphrey's evidence is sought to be adduced for the purposes of contradicting the finding of the Tribunal at CB480 that:

> *"The information that other nationalist, anti-Syrian groups of a secular nature, with non-Christian members in supporters, have existed in Lebanon for many years also tends to contradict the applicant's claims that being an anti-Syrian nationalist, he found the Lebanese Forces to be a natural political home for his views and ideas."*

7. That finding is gainsaid by paragraphs 8 and 11 of Professor Humphrey's affidavit.

8. There are two difficulties with the proposition advanced by the Applicant. The first is that the finding of the Tribunal referred to above was but one of a plethora of findings it made.

9. Reading the Tribunal's decision as a whole, if any finding could be said to be critical, it is the finding that the Tribunal made that the alleged incident in 1981 which gave rise to the Applicant's brother's death was not true. That finding was made because the Tribunal heard the Applicant and did not believe him because of the discrepancies between his evidence and that in the brother's death certificate (see CB477-8).

10. The finding about the existence of secular groups in Lebanon was not in my opinion a central, critical finding to the Tribunal's conclusions. It was merely one, and not the most important one, amongst many.

11. Further, it cannot be said that there was no evidence before the Tribunal to ground such a finding. The Tribunal referred (CB480) to country information which clearly identified secular nationalist parties. That country information which goes back to October 2002 also stated:

> *"The secular and Christian nationalists have, with one minor exception, consistently boycotted heavily flawed parliamentary elections."*

12. Counsel for the First Respondent pointed out that this meant that that activity must have been going on for some time, and I accept that proposition.

13. Just as I do not accept that the finding about the secular groups in Lebanon was a critical step in the Tribunal's reasoning and therefore a jurisdictional fact, likewise I do not accept that there was no evidence which could have enabled the Tribunal to come to that conclusion. Merely to misunderstand evidence or make an error of fact is not automatically to commit a jurisdictional error.

14. Further, I think there is some considerable force in what might be described as the technical objections taken by counsel for the First Respondent to Professor Humphrey's affidavit. Professor Humphrey does not, as he should do, set out the instructions that were given to him, nor does he indicate the materials that he had consulted. Although

it is immediately apparent that Professor Humphrey is both erudite and well-versed in certain aspects of Lebanese life and experience, his formal qualifications are in the field of sociology and social policy, and the vast bulk of his published material is concerned with the Lebanese diaspora, most particularly its experiences as migrants in Australia.

15. There is virtually nothing in the very long and impressive list of the professor's publications that necessarily grounds expertise in military-political matters of the sort with which his affidavit seeks to deal. It is entirely possible that Professor Humphrey is, by virtue of his long research into matters Lebanese, in a position to give expert evidence of the sort that was intended. I have to say, however, that on the material as filed, I am not in a position to make a finding that that is so.

16. Accordingly, I am not prepared to admit the affidavit of Professor Humphrey into evidence, nor in any event do I accept that the ground in the application which that evidence was designed to advance is made out.

17. The other substantive ground advanced by the Applicant is that of bias. Following two hearings at which the Applicant had attended and given evidence, and at which a number of his relatives and friends had also done so, on 4 July 2006 the Tribunal wrote to the Applicant pursuant to s.424A of the *Migration Act 1958* (Cth) ("the Act").

18. Having referred to evidence received from a number of family and friends, the Tribunal observed:

> *"All of these people are either close relatives of yours or have been known to you for many years. As such, they have a strong incentive to ensure the success of your application for protection.*
>
> *This information is relevant because an inference may be drawn that the witness evidence provided by these people is not genuine and lacks credibility."*

19. As I pointed out to counsel for the First Respondent, the first part of that statement is unobjectionable. It conforms with human experience and ordinary commonsense.

20. The second part of the Tribunal's letter is, however, problematic. It does indicate a predisposition.

21. Although on one view, family and friends might be said to be likely to do their best for any person who calls upon them, the presupposition that such people might be dishonest is not a proper observation.

22. Furthermore, from whom else is it likely that a refugee would get evidence? His or her enemies would not wish to assist them. Only friends and relatives are likely to have direct knowledge of the Applicant's circumstances and to wish to give evidence to assist them.

23. Furthermore, how does a person in receipt of this sort of s.424 letter respond save, as happened here, by attesting and repeating again that they are telling the truth?

24. It was not in fact necessary for the Tribunal to put the proposition about possible dishonesty to the Applicant and his witnesses. The Tribunal could have made a finding adverse to their credit without the letter.

25. Nonetheless, the letter was sent and in my view it does disclose a predisposition.

26. That, however, is not the end of the matter. The Tribunal’s reasons for decision given were lengthy and detailed and traversed all the matters before it. There is nothing in the reasons that suggests that the Tribunal gave any effect to the predisposition to which I have referred.

27. As I have said, the central critical finding, as it seems to me, made by the Tribunal was its rejection of the 1981 incident involving the death of the Applicant's brother. In the entire narrative, that was the most compelling piece of evidence advanced by the Applicant, and was clearly on one view the wellspring of all his subsequent misfortunes.

28. Having disbelieved the Applicant about that incident, it is not surprising that the Tribunal went on to dismiss numerous other aspects of the Applicant's story.

29. Similarly, the findings made by the Tribunal about the other witnesses to whom reference has been made turned upon detailed analyses of what it was that the witnesses actually said to the Tribunal. The real

issue is whether, taking the s.424 letter in context and looking at the Tribunal's reasons as a whole, the Tribunal was open to persuasion.

30. This is a finely balanced matter. Apart from the single offending sentence set out in paragraph 18 above the Tribunal's reasons for decision were unimpeachable. They contained findings which could have been fatal to the application even if one wholly ignores the material about which the Tribunal expressed its scepticism.

31. Nonetheless, if one accepts, as I do, that the Tribunal had a preconceived bias about the Applicant's friends and relatives, how can one be sure that that did not affect the other findings the Tribunal made? I am not able to be so.

32. In the circumstances of this case the "hypothetical fair-minded lay person … might reasonably apprehend that the Tribunal … might not have brought an impartial mind to the resolution of the assertion to be denied" (per Mansfield J in *SZCSC v Minister* [2007] FCA 418 at [38]).

33. In my opinion, the bias point is made out. While counsel for the First Respondent argued cogently that bias was not made out it was nonetheless implicit in his submissions that a finding of bias would give rise to jurisdictional error. The Applicant should be granted the relief he seeks.

34. There will be orders accordingly.

I certify that the preceding thirty-four (34) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Deputy Associate: Ann Pretty

Date: 12 October 2007