

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*SZIQM v MINISTER FOR IMMIGRATION & ANOR* [2007] FMCA 1372

MIGRATION– Visa – protection visa – Refugee Review Tribunal – application for review of decision of Refugee Review Tribunal affirming decision not to grant protection visa – applicant is a citizen of Philippines claiming fear of persecution as a result of murder of her uncle by rebels in the Philippines – Court cannot undertake merits review.

*Judiciary Act 1903* (Cth), s.39B

*Migration Act 1958* (Cth), ss.91X, 417, 474

*SZEWB & Ors v Minister for Immigration* [2005] FMCA 1145 referred to.

*SZHCJ v Minister for Immigration & Multicultural Affairs* [2007] FCA 205 followed.

*SZIQN v Minister for Immigration & Anor* [2007] FMCA 1376 referred to.

Applicant:	SZIQM
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG 1042 of 2006
Judgment of:	Scarlett FM
Hearing date:	16 February 2007
Date of last submission:	16 February 2007
Delivered at:	Sydney
Delivered on:	3 August 2007

## **REPRESENTATION**

Counsel for the Applicant: Mr Young

Solicitors for the Applicant: D J Hegarty Consultants Pty Ltd

Counsel for the Respondent: Mr Lloyd

Solicitors for the Respondent: Clayton Utz

## **ORDERS**

- (1) The title of the First Respondent is changed to Minister for Immigration & Citizenship.
- (2) That there be an order in the nature of certiorari quashing the decision of the Second Respondent made on 17 February 2006 and handed down on 9 March 2006.
- (3) That there be an order in the nature of mandamus returning the application of the Applicant to the Second Respondent to be determined according to law.
- (4) The First Respondent is to pay the Applicant's costs fixed in the sum of \$4,500.00.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
SYDNEY**

**SYG 1042 of 2006**

**SZIQM**  
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 of the Refugee Review Tribunal. The Tribunal decision was signed on 17<sup>th</sup> February and handed down on 9<sup>th</sup> March 2006. The Tribunal affirmed the decision of a delegate of the Minister not to grant to the Applicant a protection visa.
2. The Applicant now seeks judicial review of that decision. In her application filed on 6<sup>th</sup> April 2006 the Applicant seeks the following orders:
  - a) The decision of the Second Respondent made on 17 February 2006 and handed down on 9 March 2006 be quashed.
  - b) An order in the nature of mandamus requiring the Second Respondent to review, according to law, the decision of a delegate of the First Respondent to refuse a Protection visa to the Applicant.

- c) The First Respondent to pay the Applicant's costs.

## **Background**

3. The background to this matter is that the Applicant is a citizen of the Philippines. She arrived in Australia on 29<sup>th</sup> October 2003. On 2<sup>nd</sup> February 2004 she applied for a Protection (Class XA) visa with what was then known as the Department of Immigration & Multicultural & Indigenous Affairs.
4. On 6<sup>th</sup> February 2004 a delegate of the Minister refused the Applicant for a protection visa. On 26<sup>th</sup> February 2004 the Applicant applied to the Refugee Review Tribunal for a review of that decision. The Tribunal affirmed the delegate's decision not to grant a protection visa on 20<sup>th</sup> May 2004. The Applicant then sought judicial review of the decision of the Tribunal from the Federal Magistrates Court.
5. On 25<sup>th</sup> October 2005 the Court made orders by consent remitting the Applicant's application to the Refugee Review Tribunal for reconsideration.
6. The Tribunal wrote to the Applicant on 21<sup>st</sup> November 2005 and invited her to attend the hearing scheduled for 8:30am on Wednesday 14<sup>th</sup> December 2005. The Applicant, through her migration agent, completed the Response to Hearing Invitation indicating that she did wish to attend the hearing and that she would like an interpreter in the Tagalog language. She also indicated that she wished to bring another person with her to the hearing. That person is a relative of hers.
7. The Applicant told the Tribunal that she wanted her relative to give evidence in her proceedings, in particular to give evidence about other family members having been killed by Communist rebels. The other family member, whom I will not name, is also an Applicant for a protection visa<sup>1</sup> and there are separate proceedings before the Court.
8. The Applicant provided to the Tribunal a copy of her Philippines passport and a number of other documents including a faxed copy of an autopsy report relating to a man who was murdered by rebels who was

---

<sup>1</sup> See *Migration Act 1958* (Cth) s.91X

a relative, both of the Applicant and of the lady who the Applicant was calling as a witness.

9. The Applicant also submitted to the Tribunal a letter dated 16<sup>th</sup> November 2005 which also included submissions on behalf of the Applicants prepared by Mr Young of counsel in the matter *SZEWB & Ors v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FMCA 1145. It was those proceedings that were heard in the Court by Smith FM.
10. The submissions of 16<sup>th</sup> November 2005 re-tendered submissions made on 29<sup>th</sup> February 2004 and 5<sup>th</sup> April 2004. In the submissions the Migration Agent pointed out that this was an application by two people who claimed fear of persecution as the Applicant's witness was the widow of a man who was murdered who was a councillor allied to the mayor of a municipality but was shot dead by members of a rebel group identified on evidence to the Tribunal.
11. The Applicant attended hearing of the Tribunal on 14<sup>th</sup> December 2005. She gave oral evidence with the assistance of an interpreter in the Tagalog language. The Applicant's case is that she lived in the Philippines with her aunt and her four children and travelled to Australia with them. The aunt and four children had lodged a joint application for a protection visa at the same time as the Applicant had, based on essentially the same circumstances and claims.
12. The earlier Tribunal considered both applications - that relating to the Applicant and that relating to the Applicant's aunt and her four children - at a joint hearing and prepared separate decisions. Both of those matters were remitted to the Tribunal for reconsideration. The matter under review was remitted by means of consent orders following a decision by the Federal Magistrates Court quashing the Tribunal's decision in respect of the Applicant's aunt's review application.
13. The Tribunal decision record can be found in the Court Book at pages 110 through to 131. The Tribunal noted that the Applicant was an unmarried national of the Philippines who was aged 23 at the time and feared to return to the Philippines where she witnessed the assassination of her uncle by armed forces of the New People's Army (NPA). I will not mention the name of the uncle because disclosing his

name would be likely to identify the Applicant's aunt who is Applicant SZIQN in separate proceedings before me.

14. The Applicant in this matter claimed that if she were to return to the Philippines she may be kidnapped, she may be beaten, tortured or raped and she may even be killed. She stated that she feared factions of the New People's Army if she were to return to the Philippines. She was a witness to the assassination or murder of her uncle, the husband of her aunt, who is an independent councillor, and she left the Philippines for Australia with her aunt for fear that the family may be targeted for reprisal and because she might be able to identify the attackers.
15. The Tribunal noted the Applicant's claim that she was young and poor and did not believe that the police would bother to protect her. The Tribunal noted the Applicant's claim that the police in the Philippines are corrupt and inefficient in the Applicant's view, which makes her unwilling and unable to avail herself of their protection.
16. The Applicant provided a statutory declaration which is set out on page 115 of the Court Book. I will read it onto the record with certain amendments in order not to identify the Applicant's aunt or the Applicant's late husband:
  1. *I am the niece of SZIQN<sup>2</sup> and I am a member of her family and have lived with her for over five years. Her husband, (name deleted), was an independent councillor.*
  2. *On 12/02/2003, I witnessed the assassination of SZIQN's husband in the family home.*
  3. *While I was cleaning SZIQN's room, a group of men dressed completely in black, entered the house and into the room which I was cleaning.*
  4. *They searched the house and they took guns and the mobile telephone. They left the room and when I left the room I saw the 5 men were talking to my aunt and my uncle.*
  5. *I tried to follow them but one of the men pointed a gun at me and told me not to follow.*

---

<sup>2</sup> Name withheld to comply with *Migration Act 1958* s.91X

6. *I went back to the house and locked myself with the three children in a room. I saw the neighbours running to the house and a short time later the ambulance came and took the body of my uncle.*
  7. *The gunmen who killed my uncle know I can identify them because I saw their faces and because they threatened me that if I say anything to the police I will be next.*
  8. *I fear that I may be abducted, raped or harmed by the armed gang because of my family connection to my aunt and because I am a witness to the assassination.*
17. The Applicant also provided copies of an article in a newspaper called People's Journal of 14<sup>th</sup> February 2003 relating to the killing and noted a reference to other documentation. The Tribunal considered the evidence given by the Applicant and her aunt to the first Tribunal at a Tribunal hearing on 7<sup>th</sup> April 2004. Needless to say; that was differently constituted.
  18. The Tribunal set out at pages 119 through to 124 an extensive summary of the Applicant's evidence to the Tribunal hearing. The Tribunal noted that the Applicant was accompanied by her adviser who was also the adviser for the Applicant's aunt, SZIQN. The Tribunal noted that the Applicant's aunt, SZIQN, gave evidence at the hearing. The Tribunal noted that it would have regard to the evidence which the Applicant had provided at her first hearing and possibly other material. The Tribunal noted the Applicant's passport which was presented to the Tribunal and the Applicant told the Tribunal that her aunt was related to her on the maternal side.
  19. The Applicant presented two documents. They were death certificates. One was a death certificate dated 28 February 1980 concerning the killing of the Applicant's uncle's brother who was the brother-in-law of the aunt, SZIQN, and the other death certificate, dated October 1987 concerned the killing of the Applicant's uncle's father. The Tribunal noted that the Applicant knew from her aunt only that he had been killed but she did not know who had done this.
  20. The Tribunal asked the Applicant about the circumstances of her obtaining a passport in July 2003 and noted that the Applicant told the Tribunal that her aunt had organised the passport during the period that

her aunt had been receiving death threats. The Tribunal noted that the Applicant said that there had only been one letter to her knowledge. The Tribunal then asked the Applicant about the circumstances of the killing of her uncle in February 2003.

21. The Tribunal asked the Applicant what had happened in the period after the killing that made her feel unsafe and the Applicant said that people came looking for her aunt or following the car and the Applicant referred to a letter which had been received in July 2003. The Applicant told the Tribunal that she did not actually read the letters as it was addressed to her aunt, but her aunt told her of its contents and told her that it had been written by the NPA. The Applicant also referred to a second letter which she passed on to her aunt without reading it.
22. The Applicant's adviser spoke to the Tribunal and stressed that the Applicant remained fearful of returning to the Philippines. The Applicant told the Tribunal of her fear that she might be killed and said that the people who did it knew that she was with her aunt and would pursue her. The Tribunal noted:

*She added that 'they' had mentioned that she would be the target if she told anyone about the killing. They had said this when, on the day of her uncle's killing she had tried to leave the house to take hold of the baby. The Applicant said that she recognised the assailants, although she did not know their names. She confirmed that she had not spoken to the police, as she was not at the house when they were investigating.<sup>3</sup>*

23. The Tribunal asked the Applicant about the circumstances of the Applicant's neighbours at the time. The Applicant confirmed that she knew them and that she knew of the death of the brother-in-law. She said that that man was a policeman, although she did not have details of the kind of work that had been done.
24. The Applicant's aunt gave evidence to the Tribunal. The aunt, SZIQN, was asked by the Tribunal why she had not sought police protection, which was a matter discussed at her earlier hearing. The Tribunal noted:

---

<sup>3</sup> See Court Book at page 122



*The aunt explained that the police had not responded to her sister-in-law's telephone call when the assailants had come for her husband. They had investigated only once after the killing, with no results so far. She said that the police had failed to provide protection to her husband, a municipal councillor. She was also scared because the letters she received warned her not to seek police assistance. She did not see what else she could do as an ordinary citizen. Her fear was such that she did not risk going to the police.*

*The Applicant's aunt confirmed that her brother-in-law, Sergeant (name deleted) was a policeman - he was hiding in his house at the time of the attack on her family. Responding to the Tribunal's query about whether she sought his assistance in protecting her family in the months following her husband's death, she said that she did not. Asked why, she said: 'I do not know why'.<sup>4</sup>*

## **The Tribunal's Findings and Reasons**

25. The Tribunal's findings and reasons are set out at page 124 through to 131 of the Court Book. The Tribunal accepted that the Applicant was a national of the Philippines and assessed her claims against that country. I note that the Applicant had produced her passport issued by the Philippines. The Tribunal summarised the Applicant's claim in this way:

*Essentially, it is the Applicant's claim that she fears persecution from extremist rebels. First, she fears that they will harm her as an eyewitness to her uncle's assassination. Second, she fears that they will harm her for the same reason as they will harm SZIQN and her family, i.e. by virtue of her association with that family, having lived with them in Iba and San Felipe, worked for them and now having also travelled to Australia with them. She fears that the rebel groups will target her anywhere in the Philippines, and that the police are corrupt and inefficient, thus unable to protect her from such harm.<sup>5</sup>*

26. The Tribunal accepted that the Applicant's uncle was murdered in February 2003 and it accepted the essential and significant reason for the murder was her uncle's political opinion, actual and imputed. The Tribunal went on to say:

---

<sup>4</sup> See Court Book at page 123

<sup>5</sup> See Court Book at page 125

*The Applicant's personal claim arising from this relates specifically to her claim to have been an eyewitness to the murder. Although there have been differing accounts of the precise sequence and location of events on that day, the Applicant's evidence at both hearings has consistent elements. She was inside the house, cleaning and taking care of the three older children at the time the assassins arrived; five men entered the room where she was with the children (out of a total of about 30 who were elsewhere in the house and in the yard); she tried to leave the house to fetch the youngest child from her parents, who were under attack; she was told, at gunpoint, not to leave the house; and, she remained there with the children, terrified, until neighbours told her later that day what had happened to her uncle.*

*The Tribunal concludes from this that she was not an eyewitness to the murder in the normal meaning of those words. The Applicant's evidence reveals that she saw five, possibly more, of the 30 men involved in the attack. She stated that she could recognise (implicitly, if she saw them), but did not know their actual identities. The Tribunal notes that the police, even if their investigation was, as claimed by the Applicant and her aunt, cursory, did not include the Applicant in their witnesses. The material before the Tribunal indicates that the Applicant did not actually witness the killing itself and therefore is not a person able to identify those directly responsible.*

*The perpetrators threatened the Applicant as they left the house, before taking her relatives to the other site where the execution was carried out. These were generalised threats, intended to intimidate the Applicant. The Tribunal does not accept that their meaning should be taken literally. First, the threat was specifically linked to the Applicant talking to the police, something which she says she has in fact never done. Second, the perpetrators have not tracked down the Applicant, communicated with her or in any other matter, demonstrated either (a) their knowledge that she could recognise them, or (b) their intent to silence or intimidate her as a result of what she did see. Third, the Tribunal notes that it was in the Applicant's evidence that she remained in Iba for about one week following the death, and that, even after moving to San Felipe, commenced and completed a further semester of her Bachelor's course, from July to October 2003. The murder took place in February 2003. The Applicant was undoubtedly scared in the immediate aftermath of the incident. However, the lack of contact from the rebels, and her own choices in enrolling in and completing a*

*further semester in Iba, demonstrate that she did not have a subjective or well-founded fear of persecution arising from the killing itself.*<sup>6</sup>

27. The Tribunal went on to consider the Applicant's claims arising from her relationship with her aunt, noting that the Applicant relied on her relationship with her aunt and claimed to have similar fears deriving from those of her aunt. The Tribunal accepted that the Applicant was a member of the aunt's household and accepted others would perceive her as part of her aunt's family even though they do not share the same family name or other readily recognisable common features, even though the Applicant's activities appear to resemble of quasi-employment.
28. The Tribunal noted that much of the Applicant's evidence was based on impressions formed from what her aunt had told her rather than a direct knowledge. The Tribunal held:

*It follows from the above that the success of the Applicant's refugee claims necessarily depends on whether it is established that her aunt has a well-founded fear of persecution. Even then, the nature of the 'familial' relationship, the Applicant's limited involvement in and knowledge of her aunt's immediate affairs and/or other factors may mean that the Applicant's risk is significantly less than that of her aunt.*<sup>7</sup>

29. The Tribunal was not satisfied that the Applicant's aunt had a well-founded fear of persecution for a Convention reason and was not satisfied that the Applicant had a well-founded fear of persecution arising out of her connection with her aunt and then set out the reasons on pages 127 through to 129. The Tribunal went on to say that it had considered the Applicant's aunt's claims together with those of the Applicant and found that the Applicant's claims, whilst closely related to those of her aunt, were vaguer and to a large extent derivative. They were also narrower in scope as her perceived association with her deceased uncle was obviously more limited.
30. The Tribunal found that the Applicant did not have a subjective fear of persecution prior to leaving the Philippines. The Tribunal did not

---

<sup>6</sup> See Court Book at page 126

<sup>7</sup> See Court Book at page 127

accept that there were people asking the Applicant's aunt and was not satisfied that the murder of the male police officer, established a real chance that the Applicant, with a completely different personal profile, would be seriously harmed. The Tribunal was not satisfied that any of those factors considered individually and cumulatively established a real chance of persecution for Convention reasons where there had previously been none.

31. The Tribunal concluded that the Applicant did not have a well-founded fear of prospective persecution for Convention reasons in the Philippines. The Tribunal considered the possibility of other non-Convention related harm such as criminal activity might befall the Applicant if she were to return to the Philippines and went on to assess whether there was a real chance that the state would deny her protection from such harm on a selective and discriminatory basis for Convention reasons.
32. The Tribunal concluded that the Applicant did not face a real chance of Convention related persecution arising from the state's discriminatory denial of protection from non-Convention harm.

*The Tribunal acknowledged that the Applicant had been reliant to some extent on her aunt, and that she may have suffered some stress due to the family's experiences. It appreciates that she may have unpleasant memories of her time in the Philippines and a generalised fear of future violence.*<sup>8</sup>

It appears to me to be a masterful piece of understatement.

33. The Tribunal was not satisfied that the Applicant faced a real chance of Convention related persecution in the Philippines at the time of the hearing or in the reasonably foreseeable future if she were to return to the Philippines and went on to say:

*Although the Applicant and her adviser did not directly articulate this, her claims and presentation suggest that she wishes the Tribunal to consider the humanitarian aspects of her application. The Tribunal's role is limited to determining whether the Applicant satisfies the criteria for the grant of a protection visa. A*

---

<sup>8</sup> See Court Book at page 130

*consideration of her circumstances on other grounds is a matter solely within the Minister's discretion.*<sup>9</sup>

34. The Tribunal affirmed the decision not to grant the Applicant a protection visa.

### **The Application for Judicial Review**

35. The Applicant in her application sets out ten grounds:
- i) The Refugee Review Tribunal (RRT) made jurisdictional error by treating a statement by the killers of the husband of the Applicant's aunt, that they would kill all members of her family, as not being an accurate reflection of their motivation, where there was no evidence for this finding.
  - ii) The RRT made jurisdictional error by treating threats by the killers of the husband of the Applicant's aunt as being of no account because the aunt and her son had not been harmed.
  - iii) The Tribunal made jurisdictional error by rejecting the Applicant's claim to fear persecution as a member of the (name deleted) family as necessarily failing because her aunt's husband was murdered because of his political profile.
  - iv) The RRT failed to adopt the real chance test in assessing evidence of threats to the Applicant and members of her family.
  - v) The RRT failed to consider whether fear of harm as a consequence of a Convention-related murder could amount to a well-founded fear of execution even if the perpetrators of the threats were not themselves acting from a political motivation.
  - vi) The RRT made jurisdictional error by treating as irrelevant the Applicant's aunt's claim that she had lost faith in the police.

---

<sup>9</sup> See Court Book at page 131

- vii) The RRT limited its consideration of State protection to whether the State would deny the Applicant protection on a selective and discriminatory basis for Convention reasons.
- viii) The RRT failed to consider whether the murder of the brother-in-law of the Applicant's aunt, a policeman, in November 2005, was such as to give the Applicant a well-founded fear of persecution for reasons of her membership of her family.
- ix) The RRT exercised its jurisdiction in a manner which was so unreasonable that no reasonable person could have so exercised the power.
- x) The RRT engaged in inappropriate speculation as to what a person who genuinely feared serious harm would do in a particular situation when there was no basis for such speculation and the speculation was inconsistent with the role of the Tribunal in determining whether the Applicant was a person to whom Australia had protection obligations under the Refugee's Convention.

36. Counsel for the Applicant prepared a written outline of submissions which were filed at this Court on 14<sup>th</sup> February 2007. The Applicant's counsel submitted that the pivotal finding in relation to the Applicant's aunt's claim was that it was not satisfied that the aunt had suffered persecution following the murder or that any harm which had occurred to her was related to the husband's murder. The Applicant submits that the Tribunal did not find that the Applicant's aunt did not fear the threats after her husband's murder but found that the aunt did not fear serious harm from the rebels. The Tribunal did not accept the aunt's reasons for not contacting the police.

37. The submission goes that once the Tribunal had accepted that threats were later made to the aunt as a consequence of the murder of the husband, the Tribunal was bound to consider whether the Convention reason was the essential and significant reason for those threats and whether the aunt had a well-founded fear of persecution as a result but the Tribunal did neither.

38. The Applicant submits that the Tribunal did not consider the evidence as to whether the aunt, who left the Philippines in 2003 in company with the Applicant, would have a well-founded fear of persecution if forced to return to the Philippines given those circumstances. Even if the Tribunal did not accept that the brother-in-law had not been killed because of a family link, the murder of two family members for reasons of political opinion raises the issue of a well-founded fear of persecution by reason of that family link. Fear based on two murders can be well-founded even if the two events do not affirmatively establish a link. He went on to submit that the question of whether the motivation for two murders of the same family are because of the family link does not necessarily give rise to the same answer as whether another member of the same family will have a well founded fear of harm because of a family connection. The submission therefore is that the Tribunal made jurisdictional error.
39. Counsel for the Respondent, Mr Lloyd, prepared a written outline of submissions filed on 12<sup>th</sup> February 2007. They related to the claims of the Applicant's aunt, SZIQN. In relation to the first ground that there was no evidence to support the Tribunal's conclusion that a statement by one of the killers of the aunt's husband about his motive was not an accurate reflection of his motivation. Statement being was to the effect that they would kill all members of the family. The Tribunal did not accept that this was accurate having regard to the fact that they had had the opportunity to kill more but had not done so. For example; they could have killed the Applicant's aunt and her son at the same time but did not do so. This was a finding a fact for the Tribunal and not an error outside the Tribunal's jurisdiction.
40. As to the second ground; that the Tribunal made jurisdictional error by treating threats by the killers of the aunt's husband of being of no account because the aunt and her son had not been harmed; this also was a finding of fact by the Tribunal and there was no jurisdictional error.
41. As to the third ground; that the Tribunal made jurisdictional error by treating the Applicant's claim as being a member of the family group because the husband was murdered because of his political profile; it is submitted that the Tribunal did not treat the claim as necessarily

failing, it was just not satisfied that the Applicant faced harm by reason of her family membership, which was a finding of fact open on the evidence.

42. As to the fourth ground; that the Tribunal failed to adopt the real chance test in evaluating the threats to the Applicant and members of her family; it was submitted that the Tribunal correctly stated the law pertaining to that test at the beginning of its reasons and applied that test in its findings and reasons. He submitted that the Applicant disagrees with the Tribunal's view. It is not revealed that the wrong test was applied and amounts to no more than an invitation to undertake merits review.
43. As to the fifth ground; that the Tribunal failed to consider whether harm as a consequence of a Convention related murder could amount to a well-founded fear of execution, even if the perpetrators of the threats were not themselves acting from a political motivation, counsel for the Respondent Minister submitted that the Tribunal found that the Applicant did not have a genuine fear and there was no connection between the threats and the murder of the husband.
44. As to the sixth ground; that the Tribunal treated as irrelevant the aunt's claim that she had lost faith in the police; the Tribunal found that the aunt did not face a real chance of persecution for a Convention reason, making it unnecessary to consider whether the aunt could access police protection. In any event, it went on to find that the aunt could do so and the lack of faith in the police was not sufficient to make her a refugee. It was submitted there was no jurisdictional error.
45. As to the seventh ground; that the Tribunal limited its consideration of State protection as to whether the police would deny her protection; Mr Lloyd submitted that this was because that that finding was all that could be relevant on the Tribunal's finding and no jurisdictional error was disclosed.
46. As to the eighth ground; that the Tribunal failed to consider whether the murder of the brother-in-law of the Applicant's aunt in November 2005 was such to give the Applicant a well-founded fear of persecution by reason of her family membership; it is submitted that this was expressly taken into account by the Tribunal in its analysis.



47. As to the ninth ground; that the Tribunal made a decision that was so unreasonable that it was an unreasonable exercise of the power conferred; Mr Lloyd submitted:

*Even if this ground could constitute jurisdictional error, the Tribunal's decision is clearly reason that it cannot be said to be unreasonable in any relevant sense. This is yet another invitation to merits review.*

48. As to the tenth ground; that the Tribunal engaged in inappropriate speculation about what a person who genuinely feared persecution would do in a particular situation; Mr Lloyd submitted that this was something that fell clearly within the Tribunal's jurisdiction to decide and was precisely the job of the Tribunal in assessing the claim of protection visa applicants. The submission therefore is that there is no jurisdictional error and that the application should be dismissed.

49. In assessing this claim it is important to note that the function of the Federal Magistrates Court is not to consider afresh the evidence in the Applicant's case and make its own decision on the facts. The task of the Federal Magistrates Court is to consider whether or not there is jurisdictional error. As Gyles J said in *SZHCJ v Minister for Immigration & Multicultural Affairs* [2007] FCA 205 at [3]:

*Insofar as the Federal Magistrates Court is concerned, it has no role to second-guess the Tribunal on matters of fact or judgment. The Federal Magistrates Court can only correct the Tribunal if jurisdictional error is revealed.*

50. This Court cannot undertake merits review even noting in a case such as this that it may well be the case that another person considering the evidence would form a view significantly different to that reached by the Tribunal Member. It is the Tribunal that conducts merits review and not the Court. Nevertheless, the Tribunal's rather off-handed account of humanitarian aspects of the application in the first paragraph on page 131 is remarkable and it may well be the case that another person hearing the evidence would be satisfied that the Applicant did indeed have a well-founded subjective fear, bearing in mind the circumstances in which she was involved. The fact that she did not actually witness the act of killing of the uncle is, with respect, a rather astonishing piece of hair splitting.

51. In my view; even if I were not satisfied that there was jurisdictional error there would be a strong case for presentation to the Minister for consideration of the Minister's discretion under s.417 of the Migration Act. That is of course a matter entirely for the Minister and not for the Court but it may well be a matter that would be considered by the Applicant's advisers at some stage should it become necessary.
52. But in my view, however, for the reasons set out in *SZIQN v Minister for Immigration & Anor* [2007] FMCA 1376, namely the claim of the Applicant's aunt, I am of the view that this Applicant has also established jurisdictional error on the part of the Tribunal. In my view the Applicant's claim as a member of the family of SZIQN is sufficient to enable the Court to be satisfied as to jurisdictional error.
53. Accordingly, I am satisfied that there should be an order in the nature of certiorari quashing the decision of the Tribunal and I am satisfied that there should be an order in the nature of mandamus returning the application to the Tribunal to be determined according to law.
54. The Applicant has been legally represented in these proceedings and in the circumstances I am satisfied that this is a matter where costs should follow the event and I have heard submissions from Mr Young of counsel as to an appropriate figure and in my view there should be an order for costs in favour of the Applicant in the sum of \$4,500.00.

---

**I certify that the preceding fifty-four (54) paragraphs are a true copy of the reasons for judgment of Scarlett FM**

Associate: V. Lee

Date: 14 August 2007