FEDERAL COURT OF AUSTRALIA

SZVYD v Minister for Immigration and Border Protection [2019] FCA 648

Appeal from:	*SZVYD v Minister for Immigration & Anor* [2017] FCCA 2909
File number:	NSD 1994 of 2017
Judge:	**ALLSOP CJ**
Date of judgment:	14 May 2019
Catchwords:	**MIGRATION** – protection visa – whether a law is of general application – whether a law is appropriate and adapted to some legitimate object in the country in question
Legislation:	*Migration Act 1958* (Cth)
Cases cited:	*Aala v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 204 *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; 190 CLR 225 *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25; 217 CLR 387 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19; 201 CLR 293 *Lama v Minister for Immigration & Multicultural Affairs* [1999] FCA 918; 57 ALD 613 *Minister for Immigration and Citizenship v SZNWC* [2010] FCAFC 157; 190 FCR 23 *MZZTW v Minister for Immigration and Border Protection* [2015] FCA 475 *WAEZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 341 *“Z” v Minister for Immigration and Multicultural Affairs* [1998] FCA 1578
Dates of hearing:	23 April 2018, 21 August 2018
Registry:	New South Wales
Division:	General Division
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Category:	Catchwords

Number of paragraphs:	17
Counsel for the Appellant:	Mr P Bodisco
Counsel for the First Respondent:	Mr J Kay-Hoyle
Solicitor for the First Respondent:	Clayton Utz

ORDERS

NSD 1994 of 2017

BETWEEN:	**SZVYD** Appellant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** First Respondent **ADMINISTRATIVE APPEALS TRIBUNAL** Second Respondent
JUDGE:	**ALLSOP CJ**
DATE OF ORDER:	**14 May 2019**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ:

1 This is an appeal against orders made by the Federal Circuit Court of Australia on 4 October 2017 dismissing an application for judicial review of a decision of the Refugee Review Tribunal of 23 December 2014 which affirmed the decision of a delegate of the Minister not to grant the appellant a protection (class XA) visa.

2 The applicant is a citizen of Bangladesh and a Muslim who arrived in Australia in 2002. He claimed protection because he became and has remained dependent on alcohol since 2004. He claimed to fear persecution by reason of the laws of Bangladesh concerning alcohol. The Tribunal found that the law (the *Intoxicant Control Act 1990*) under the application of which persecution was feared was a law of general application ([28]) and if it were not and if it were to be seen as discriminatory, it was appropriate and adapted to achieve a legitimate object ([29]).

3 Given the issues on appeal, it is appropriate to set out the relevant reasoning of the Tribunal in full at [25]-[31]:

> 25. The applicant claims that he faces penalties including imprisonment if he is found to have consumed alcohol which is prohibited in Bangladesh.
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> 26. The Bangladeshi Intoxicant Control Act 1990 is stated to be "An Act made to provide for control of intoxicants and cure and rehabilitation of alcoholics" (http://www.asianlii.org/cgibin/disp.pl/bd/legis/num_act/ical990230/ical990230.html?stem=0&synonyms=0&query=Bangladesh%20AND%20intoxicant). It provides that no person except the holder of a licence issued under the Act may produce alcohol; no person except the holder of a permit issued under the Act may consume alcohol; and no Muslim may be granted a permit to consume alcohol except on medical reasons (Section 10). It provides that the government shall establish at least one Intoxication Cure Centre, and it may declare any hospital or "medical centre provided with a jail-hospital" (sic) an Intoxication Cure Centre. It provides that "When the Chief-Director or an officer authorized by him in this behalf gets information of someone being, because of being addicted to intoxicants, frequently in his behaviour out of the natural way and therefore, in order to bring him back to a natural way of life, being in need of a cure without any further delay, then the aforementioned authorities may, by a notice in written form, order the intoxicated person to commit himself to the charge of a physician or to a Intoxication Cure Center within seven days after receipt of the notice" (Section 16). It provides that the punishment for offences involving alcohol, apart from its unlicensed production, is imprisonment of up to one year or a fine not exceeding 5000 Takas (Section 26).
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> 27. It is well established that non-discriminatory enforcement of a generally applicable law does not ordinarily constitute persecution for the purposes of

the Convention (*Applicant A v MIEA* (1997) 190 CLR 225 per McHugh J at 258 referring to *Yang v Carroll* (1994) 852 F Supp 460 at 467). As Brennan CJ stated in *Applicant A*:

> …the feared persecution must be discriminatory … [It] must be "'for reasons of" one of [the prescribed] categories. This qualification … excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application. such laws are not discriminatory and punishment that is not discriminatory cannot stamp the contravener with the mark of "refugee" (*Applicant A v MIEA* (1997) 190 CLR 225, at 233).

28. I find that the law relating to alcohol consumption in Bangladesh is a law of general application. It applies to all Muslims (except for those with a medical dispensation). The overwhelming majority of the population of Bangladesh is Muslim.

29. If this assessment were wrong, and if it were the case that the law itself is discriminatory or is enforced in a discriminatory manner, l consider that the law is appropriate and adapted to achieving a legitimate object (*Applicant A v MIEA* (1997) 190 CLR 22S, at 258 per McHugh J; *Chen Shi Hai v MIMA* (2000) 201 CLR 293 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [28]; *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 per McHugh and Kirby JJ at [45]. In *Applicant S v MIMA* (2004) 217 CLR 387, Gleeson CJ, with Gummow and Kirby JJ, held that as a matter of law to be applied in Australia, these criteria are to be taken as settled). I find that this object, as stated in the introduction to the legislation, is to control intoxicants and to cure and rehabilitate alcoholics. Information to which I was referred by the application indicates that there are concerns in Bangladesh about alcohol related domestic violence and crime, as well as health issues including around the consumption of home-brewed alcohol (Annual Drug Report, Bangladesh, 2011, Bangladesh Department of Narcotics Control, http://www.dnc.gov.bd/report_dnc/dnc_annual_report_2011.pdf, accessed 23 December 2014). I consider that the law is intended to control the consumption of alcohol within Bangladeshi society in accordance with the religious principles of the religious faiths represented in the country. This reflects the terms of the Constitution which designates Islam as the state religion, within a secular state (United States Department of State Religious Freedom Report, Bangladesh, 2013).

30. In these circumstances, I find that any punishment administered to the applicant under the Intoxicant Control Act would not constitute Convention persecution. It would be a penalty imposed under a law of general application; alternatively, to the extent that the law discriminates against a section of the population, the law is nonetheless appropriate and adapted for a legitimate purpose.

31. There is no independent information before me to suggest, and l do not accept that the applicant would be treated particularly harshly by law enforcement authorities because he would be regarded as "not a proper Muslim" due to his consumption of alcohol. I consider that the applicant's claim in this regard is not supported by any objective information and is entirely speculative. While there is information indicating that Bangladeshi law enforcement authorities are corrupt and brutal, I am not satisfied, based on the available information, that there is a real chance in any individual case that a person who came to the attention of the authorities under the criminal justice system would face

> persecution for a Convention reason, including a person who was drunk or who had consumed alcohol, or a person regarded as "not a proper Muslim".

(Footnotes included.)

4 Three of the four grounds of the application before the court below concerned the question of a law of general application. (The fourth ground was irrelevant to this appeal.) The primary judge dealt with these three grounds at [7]-[13] of his reasons as follows:

> **Grounds 1, 2 and 3**
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> 7. The first three grounds of the application can be addressed as a group. In general terms, a law which has general application and does not expressly discriminate against a person or a particular social group does not provide a basis for protection under the Convention. However, like all generalisations, there are exceptions. Relevantly, for this case such an exception is that a law of general application can discriminate against a particular social group, even if not expressly addressed to a group, because it nevertheless impacts differentially on that group: *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 201 CLR 293 at 301 [21].
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> 8. Even so, such a law does not engage Australia's Convention-related protection obligations if it is appropriate and adapted to some legitimate object of the country in question: *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 258, *Minister for Immigration & Citizenship v SZNWC* (2010) 190 FCR 23 at 34 [47].
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> 9. At para 26 of its reasons the Tribunal set out the relevant substance of the IC Act in the following terms:
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>> The Bangladeshi Intoxicant Control Act 1990 is stated to be "An Act made to provide for control of intoxicants and cure and rehabilitation of alcoholics". It provides that no person except the holder of a licence issued under the Act may produce alcohol; no person except the holder of a permit issue under the Act may consume alcohol; and no Muslim may be granted a permit to consume alcohol except on medical reasons. It provides that the government shall establish at least one Intoxication Cure Centre, and it may declare any hospital or "medical centre provided with a jail-hospital" an Intoxication Cure Centre. It provides that "When the Chief-Director or an officer authorized by him in this behalf gets information of someone being, because of being addicted to intoxicants, frequently in his behaviour out of the natural way and therefore, in order to bring him back to a natural way of life, being in need of a cure without any further delay, then the aforementioned authorities may, by a notice in written form, order the intoxicated person to commit himself to the charge of a physician or to a Intoxication Cure Centre within seven day after receipt of the notice. It provides that the punishment for offences involving alcohol, apart from its unlicensed production, is imprisonment of up to one year or a fine not exceeding 5000 Takas.
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> 10. It went on to find at para 28 that the IC Act was a law of general application, saying:
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>> I find that the law relating to alcohol consumption in Bangladesh is a

> law of general application. It applies to all Muslims (except for those with a medical dispensation). The overwhelming majority of the population of Bangladesh is Muslim.

I see no error in that characterisation. However, as foreshadowed, that is not the end of the issue.

11. I accept that as the applicant is an alcoholic, the IC Act would probably have a greater impact on him than on others in Bangladesh, were he to return. However, that fact alone is insufficient to find that the IC Act had a persecutory effect or operation. The IC Act did not seek to single the applicant out personally and so was not persecutory in that sense. However, it could have been persecutory if, in its operation, it discriminated against a group of people of which the applicant was a member.

12. Paragraph 13 of the Tribunal's reasons recorded that the applicant's representative submitted at the Tribunal hearing that the IC Act was discriminatory in that it targeted the minority of the Bangladeshi population wanting to drink alcohol. The Tribunal acknowledged the possibility that the IC Act was indeed discriminatory but at para 20 of its reasons found that that Act was appropriate and adapted to advancing legitimate objects, namely, the control of intoxicants and the cure and rehabilitation of alcoholics, all in the context of the majority Muslim nation. Applying the approach described by Perram J in *Minister for Immigration & Citizenship v SZNWC* at 32 [40], I conclude that no error attaches to that conclusion. I therefore find that no error attaches to the Tribunal's further conclusion at para 30 that:

> … any punishment administered to the applicant under the Intoxicant Control Act would not constitute Convention persecution. It would be a penalty imposed under a law of general application; alternatively, to the extent that the law discriminates against a section of the population, the law is nonetheless appropriate and adapted for a legitimate purpose.

13. For those reasons, grounds 1, 2, and 3 are not made out.

5 The appeal as originally filed in this Court raised no coherent ground of appeal. The matter was listed before me on 23 April 2018 and Mr Bodisco of counsel appeared (pro bono) seeking to amend the notice of appeal. The draft notice of appeal was unsatisfactory, but I gave leave for it to be amended. In that amended form filed 8 May 2018, the appellant put his complaint as follows:

> His Honour in the court below erred in failing to apply a binding authority of Minister for Immigration and Citizenship v SZNWC and Another [2010] 190 FCR 23 at [40], [54] and [56] to penalties involving alcohol under the Bangladeshi Intoxicant Control Act 1990, which the Tribunal had construed as a "law of general application".
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> **Particulars**
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> While the judge below may have identified a legitimate object, it overlooked examination at paragraph [12] of the decision of whether the means adopted by Bangladesh were an appropriate and adapted measure to meet that object.

6 The matter was listed for hearing on 21 August 2018 on the basis of this amended notice of appeal. Implicit in the appellant's submissions was that he was a member of a particular social group which I would take to be either Bangladeshi Muslims who wish to drink or Bangladeshi Muslim alcoholics or Muslims in Bangladesh. The particular social group was never precisely articulated in argument.

7 The sole complaint is that there was no examination of the question of the relevant law being (or not being, as the case may be) reasonably appropriate and adapted to meet the object of the law.

8 The appellant relied on the Full Court's decision in *Minister for Immigration and Citizenship v SZNWC* [2010] FCAFC 157; 190 FCR 23. There was no issue in argument about the correctness of that decision or it reflecting correctly the principles in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19; 201 CLR 293 and *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25*;* 217 CLR 387. For those reasons I did not consider it appropriate for the appeal to be heard by a Full Court.

9 *SZNWC* concerned a law dealing with Bangladeshi ship deserters. By that law desertion was punishable by imprisonment of up to five years. At [53]-[55], Perram J (with whom Moore J agreed) said that following:

> 53. It being, in those circumstances, a case where a law discriminated against a particular social group the Tribunal was bound to ask whether that law served a legitimate object of Bangladesh and, if it did, whether the criminal law represented means which were appropriate and adapted to that object: *Applicant S v Minister for Immigration and Multicultural Affairs* at [43]. The Tribunal dealt with that issue this way:
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> > …the Bangladeshi legislation appears to have the legitimate objective of securing Bangladesh's reputation as a source of merchant seamen, important for the country as a means of providing employment and for future remittances. It does so by providing penalties, which may be considered harsh.
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> 54. Whilst it is clear that the Tribunal did identify a legitimate object it is just as plain that it overlooked examination of whether the means adopted to achieve that aim – a sentence of five years imprisonment for leaving non-military employment – were appropriate and adapted to that aim. Whether a law is appropriate and adapted invites an analysis based on notions of proportionality ("[i]n this context, there is little difference between the test of 'reasonably appropriate and adapted' and the test of proportionality": *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 fn (272); *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [85] per Gummow, Kirby and Crennan JJ).
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> 55. To undertake that inquiry it would have been necessary to consider the extent

> of the State interest identified by the Tribunal – here the object of securing Bangladesh's reputation as a source of merchant seamen and of ensuring employment as well as future remittances. How much of a problem was desertion by merchant seamen to Bangladesh? How large was the difficulty with remittances? What was the effect on employment? Once those questions were answered it would then have been necessary to have determined whether the potential five year sentence of imprisonment was, in fact, ever inflicted; what the usual range of penalties which were imposed, in fact, was; and, then, once all of that information had been garnered, to ask whether the penalties which were likely to be imposed were proportionate to the legitimate objects identified. Contrary to the submissions of the Minister, I do not accept that the Tribunal considered any of these questions. The closest it came was its view that the penalties were "harsh" but that, of course, was only half of the inquiry; the other half was whether that harshness was a proportionate solution to the problems identified.

10 It was submitted that the Tribunal did not ask the questions about the law here of the kind referred to by Perram J at [55] of *SZNWC*.

11 The difficulty with the argument is that it is directed to the approach to be taken if a nominated law discriminates against a social group. Here the law applies to all Muslims. The Tribunal's primary reason was that the law was not discriminatory, applying as it did to all Muslims in a country of overwhelming Muslim population. The argument must be that Muslims in Bangladesh are a particular social group.

12 The Tribunal found, as a fact (*Aala v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 204 at [44]-[49] and *WAEZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 341 at [32]-[34]) that the law was one of general application. That conclusion as to the general applicability of a law that dealt with alcohol production and consumption, applying to all in society but having provisions prohibiting consumption by Muslims, in an overwhelmingly Muslim country, cannot be said to be irrational, illogical or sufficiently defective as to reflect an error of a jurisdictional character. If on the other hand, because there are some non-Muslims so as to permit the conclusion that features of the law were discriminatory against Muslims as a particular social group, I would conclude from the discussion by the Tribunal of the law at [26]-[29] of the decision that in the broader context of religious prohibition, the legislation's regime was proportionate. The Tribunal may not have directed itself to the matter explicitly in terms of *SZNWC*, but it looked at the reasons why it was reasonably appropriate and adapted to the object identified.

13 Some of the oral argument extended beyond the amended notice of appeal, to the question of the legitimate purpose of the law. Counsel for the appellant submitted that the Tribunal misdirected itself as to what the object of the *Intoxicant Control Act* was, and that instead of

being one of control of intoxicants and rehabilitation of alcoholics, it was one which essentially effected Sharia law. The implication was that, as a result, the aim of the law was not legitimate. Counsel orally submitted that if the aim of the law was indeed legitimate, "one would think in these circumstances, it would apply to the whole population as opposed to Muslims only."

14 I would reject that submission. The values informing the law in question are not to be dismissed as illegitimate because they may not reflect values in Australia: see *MZZTW v Minister for Immigration and Border Protection* [2015] FCA 475; *"Z" v Minister for Immigration and Multicultural Affairs* [1998] FCA 1578; and *Lama v Minister for Immigration & Multicultural Affairs* [1999] FCA 918; 57 ALD 613. How one society controls or regulates the use of one drug or another, or regulates social behaviour (unless striking at fundamental human rights), is a matter for it.

15 The Tribunal found the law to be of general application. It was a finding that was open.

16 If it were not and if it can be seen to discriminate against Muslims, the Tribunal dealt with the question of reasonably appropriate and adapted as a question of fact in a way that was open to it, coherent and logical.

17 The appeal should be dismissed with costs.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop.

Associate:

Dated: 14 May 2019