FEDERAL COURT OF AUSTRALIA

SZRSN v Minister for Immigration and Citizenship [2013] FCA 751

Citation:	SZRSN v Minister for Immigration and Citizenship [2013] FCA 751
Appeal from:	SZRSN v Minister for Immigration and Anor [2013] FMCA 78
Parties:	**SZRSN v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 441 of 2013
Judge:	**MANSFIELD J**
Date of judgment:	6 August 2013
Date of hearing:	17 May 2013
Place:	Adelaide
Division:	GENERAL DIVISION
Category:	No catchwords
Number of paragraphs:	50
Counsel for the Appellant:	The appellant appeared in person
Counsel for the Respondents:	H Younan
Solicitor for the Respondents:	Sparke Helmore

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 441 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**SZRSN** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**MANSFIELD J**
DATE OF ORDER:	**6 AUGUST 2013**
WHERE MADE:	**ADELAIDE**

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The appellant pay to the first respondent costs of the appeal.

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

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PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

1 The appellant on 2 May 2013 applied for a Protection (Class XA) visa under s 65 of the *Migration Act 1958* (Cth) (the Act). On 1 March 2013, Driver FM (now Judge Driver) dismissed an application to the Federal Magistrates Court (now the Federal Circuit Court) to review a decision of the second respondent (the Tribunal): see *SZRSN v Minister for Immigration and Citizenship* [2013] FMCA 78. This is an appeal from the judgment and orders of the Federal Magistrate. It is brought pursuant to s 24(1)(d) of the *Federal Court of Australia Act 1976* (Cth).

2 The decision of the Tribunal of 30 June 2012 which affirmed the refusal of a delegate of the first respondent not to grant the appellant a protection visa stands unless this appeal is successful.

3 For reasons which are set out below, the appeal is dismissed.

4 I record that, when this appeal was called on for hearing on 17 May 2013, the appellant appeared in person. He said he wanted an adjournment to better prepare for the hearing, and that he hoped it was listed only for directions. He said he had attended only

because on 16 May 2013 he had been given the written outline of submissions of the first respondent.

5 Upon being shown two earlier letters pointing out the hearing date, he did not dispute that he had received them. He then said he was trying to get representation for the appeal, but it appeared from what he said that those efforts had only very recently commenced, he had "been busy doing other things" before then.

6 His application for an adjournment was refused, as I was not satisfied that the appellant had not been aware of the hearing date nor that, if he was given an adjournment, there was any real prospect that he would obtain legal representation. He was offered, and accepted the opportunity to put written submissions to the Court, and he nominated a period of three weeks to do so. He has not taken up that opportunity.

BACKGROUND

7 The appellant was born in 1984. He is a New Zealand citizen. He arrived in Australia on 13 July 1995 with his mother and brother, on a Special Category visa, as is generally granted to New Zealand citizens who arrive in Australia and who do not hold a permanent visa: s 32(2) of the Act.

8 That visa was cancelled on 18 October 2010 on character grounds, pursuant to s 501 of the Act. The decision to cancel the visa was made following the appellant's serving a term of imprisonment for the offence of robbery with an offensive weapon. The Administrative Appeals Tribunal (the AAT) reviewed and upheld the cancellation decision. An appeal against the AAT decision was also unsuccessful: *[Name omitted] v Minister for Immigration and Citizenship* [2011] FCA 1168.

9 The appellant also made an application for ministerial intervention pursuant to s 417 of the Act but that application was denied.

10 The appellant then lodged the application for a protection visa under the Act. That application was based on him fearing harm if he were to return to New Zealand from his father and other members of his family in New Zealand, based on previous violence he had suffered from them when he was much younger, as well as the fact that he has no family or

friends in New Zealand, other than his father who he has no contact with and no wish to contact; that he has not returned to New Zealand since he arrived in Australia on 13 July 1995; that he has no skills or employment history that will help him gain employment in New Zealand; that he has a criminal record; that he will not be able to find a job, find accommodation, or survive in New Zealand; and that there is general violence in New Zealand.

11 More generally, and understandably, the appellant wanted to remain in Australia where he could stay with his partner and his children, and care for them.

THE TRIBUNAL DECISION

12 On 30 June 2012, the Tribunal affirmed the delegate's decision to refuse the appellant's protection visa application.

13 The Tribunal took into account in assessing the appellant's claim that he had been badly injured in a fight in Australia in 2004, that he had suffered brain damage as a result, and that the brain damage had numerous effects (such as making him prone to migraines, 'fidgety', and overtired) which affected his ability to talk to the Tribunal.

14 The Tribunal then addressed his various claims. It did not accept that he had experienced any harm in New Zealand. The appellant's claims of "being bashed almost to death by his father" were not credible and were not accepted. Consequently, it was not satisfied that there was a real chance of him suffering serious harm from his father or his father's family if he returned.

15 The appellant's claim that he has no friends in New Zealand was not accepted as a Convention-related claim.

16 The Tribunal concluded that the appellant has the skills, experience, and motivation to gain employment in New Zealand and, as there was no evidence that his criminal record in Australia would work to his detriment in New Zealand, it did not consider there is a real chance of the appellant facing discrimination in finding employment in New Zealand, or of finding appropriate accommodation there.

17 It also concluded that there is no real chance that the appellant will face direct harm from gang violence in New Zealand. Any such harm would be random and would not involve systematic or discriminatory conduct. The risk of such harm would be only that risk faced by the population of New Zealand generally, and would not be targeted at the appellant for any Convention reason. Moreover, there is no real chance that the appellant would be persecuted based on a discriminatory denial or withholding of state protection for a Convention reason. There is no evidence to suggest the New Zealand law enforcement authorities cannot or would not protect the appellant.

18 It also found that there is no real chance that the appellant would self-harm in the reasonably foreseeable future if he returned to New Zealand. The appellant has a place (the city of Wellington) to go where there are people who he once knew and where he lived for his first 11 years. The information before the Tribunal did not indicate he was exposed to that risk in any event.

19 Consequently, the Tribunal concluded that the appellant is not a person to whom Australia has protection obligations under the Convention.

THE FEDERAL MAGISTRATES COURT DECISION

20 The appellant's grounds for review of the Tribunal decision were:

> 1. When the Tribunal made its decision on 30 June 2012 to affirm the delegate's decision, it was made in denial of procedural fairness and natural justice to me.
>
> 2. Procedures that were required to be followed in the making of the decisions in accordance with the Migration Act 1958 were not observed or complied with.
>
> 3. The Tribunal constructively failed to exercise discretion.

21 In respect of the procedural fairness grounds (grounds 1 and 2), the Federal Magistrate reviewed the conduct of the hearing before the Tribunal at [32]-[37] of his judgment. The Federal Magistrate concluded that the Tribunal gave the appellant a fair hearing, that the appellant was put on notice as to "the dispositive issues" and given a chance to respond to them, that the Tribunal considered all of the appellant's claims, that while the Tribunal did not refer to all the appellant's material in its reasons, that was justifiable in light of the irrelevance of that material and the fact that the Tribunal owes no obligation to refer to

every piece of evidence before it. The Federal Magistrate therefore concluded that the procedural fairness requirements of ss 424A and 425 of the Act had been followed.

22 In respect of the 'constructive failure to exercise discretion' ground (ground 3), the Federal Magistrate said that there was an "issue of significance [as to] whether the Tribunal constructively failed to exercise its jurisdiction in relation to its consideration of the complementary protection criterion" because the Tribunal's reasons did not address the issue of the appellant's separation from his children: [38].

23 The "complementary protection criterion" is a reference to the criterion for a protection visa set out in s 36(2)(aa) of the Act. That paragraph states that it is a criterion for a protection visa that the applicant is:

> a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

24 "Significant harm" is defined by s 36(2A) of the Act to be any of the following: arbitrary deprivation of life, subjection to the death penalty, torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. The definition of "significant harm" in s 5(1) of the Act makes it clear that if an act does not fall within the categories listed in s 36(2A), it is not "significant harm" – that is, the list of categories is an exhaustive one.

25 It was accepted by the Federal Magistrate that the complementary protection criterion was considered by the Tribunal albeit briefly: [38]. The question which his Honour then considered is whether the forced separation of the appellant from his children may have constituted "significant harm" for the purposes of s 36(2)(aa): [39]. The Tribunal was not satisfied that that was the case.

26 In reaching that conclusion, the Federal Magistrate undertook an analysis of the purpose of the complementary protection criterion, with reference to both the text of ss 36(2)(aa), 36(2A) and 36(2B), and to the Explanatory Memorandum to the Bill that introduced the complementary protection criterion. The Federal Magistrate concluded that the clear intention of the legislature was not to include acts of the Australian government, or consequences of acts of the Australian government, in the definition of "significant harm".

As such, separation from one's children as a result of removal from Australia could not fall within the definition of "significant harm".

27 The Federal Magistrate, having disposed of each of the three grounds for review, dismissed the application for review.

GROUNDS OF APPEAL

28 The grounds of appeal set out in the appellant's notice of appeal filed on 20 August 2012 are as follows:

> 1. The learned Federal Magistrate erred in [law] for failing to find and rule that the Tribunal was in error and misconstrued and applied the wrong test in regards to the Complementary Protection Visa regime in section 36(2) of the Migration Act 1958 in its definition and application of and in regards to the word ["]significant harm["]. (Particulars will be provided at a later date)
>
> 2. The learned Federal Magistrate erred in law for failing to find and rule that the Tribunal denied me procedural fairness and denied me natural justice on the face of the record.
>
> 3. The learned Federal Magistrate erred in law for [dismissing] my case [given] the fact I fear significant harm on return and if removed to New Zealand at the hands of the GANGS and other people acting independent of government and that my fear is in accordance with the provisions sourced from and in section 36(2)(aa) of the Migration Act 1958.

29 As noted, the appellant was unrepresented in this Court. He has not filed any outline of submissions or any other document in support of his appeal. Contrary to the comment at the end of the first ground of appeal, the appellant has not provided particulars of that ground. The respondent was represented by Ms Younan of counsel. Her written outline of submissions was filed in advance of the hearing.

CONSIDERATION

30 It is convenient to deal first with ground 2 of the appeal. That ground is an attack on the Federal Magistrate's reasoning as to whether the Tribunal afforded procedural fairness to the appellant. The Federal Magistrate considered this issue at [32]-[37] of his judgment.

31 The requirements of procedural fairness that the Tribunal must observe are set out in Division 4 of Part 7 of the Act: s 422B. Relevantly, s 424 provides that the Tribunal may get any information it considers relevant, including by inviting a person to give information.

Once that information is received, it must be considered. Information was given by the appellant in this case in both oral and documentary form. Not all of the documents given to the Tribunal were referred to in its reasons. The Federal Magistrate correctly observed that fact does not of itself demonstrate error on the part of the Tribunal. It is well established that the Tribunal is not obliged to refer in its reasons to every item of evidence that was before it: *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 402, 414; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 593; *Paul v Minister for Immigration & Multicultural Affairs* (2001) 113 FCR 396, [79]; *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 75 ALD 630, [46]; *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10, [14]; *SZEHN v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1389, [58].

32 In this case, as the Federal Magistrate noted, much of the material submitted by the appellant did not relate in any obvious way to the appellant's eligibility for a protection visa. Instead, the material related to the decision to cancel the appellant's former visa on character grounds. That decision was not the subject of the application for review before the Tribunal. It was unnecessary for the Tribunal to refer to it.

33 The Federal Magistrate found that there was no information used by the Tribunal to which the procedural requirements of s 424A of the Act attached. That finding was correct. The only information before the Tribunal that could have been characterised as "the reason, or a part of the reason, for affirming the decision that is under review" was information that fell within s 424A(3) (information provided by the appellant, and information not specific to the appellant), and was therefore exempt from the requirements set out in s 424A(1).

34 It appears from [54]-[62] of the Tribunal's reasons that the Tribunal raised with the appellant particulars of two pieces of information that the Tribunal considered "would be the reason, or a part of the reason, for affirming the decision that is under review", apparently pursuant to s 424AA(a). The two pieces of information were (1) that the appellant had been in Australia for 17 years but only now made an application for a protection visa; and (2) that the appellant had originally stated on a form that he had not experienced any harm in New Zealand, but he had then stated at the Tribunal hearing that he had in fact experienced harm in New Zealand. The procedural requirements of s 424AA(b) were satisfied in relation to

those pieces of information. The Tribunal's reasons show that it tried to ensure the appellant understood those pieces of information and their consequences. It gave the appellant additional time to respond to those pieces of information and to comment on the pieces of information.

35 Section 425 requires the Tribunal to "invite the applicant to appear before [it] to give evidence and present arguments relating to the issues arising in relation to the decision under review." The Tribunal of course did invite the appellant to appear before it. But s 425 will not be satisfied merely by inviting an applicant to a hearing. The requirements of s 425 are described by Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ in *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 228 CLR 152 at 162-163. In essence, they are that the issues arising in relation to the decision under review must be made clear to the applicant so that he or she can give evidence and present arguments on those issues in a meaningful way. The Federal Magistrate found that s 425 had been satisfied because "the dispositive issues (including the issue of credibility) were raised with the applicant in the context of the hearing, … he was given a proper opportunity to respond, and … those responses were considered": [33]. That is a finding that is clearly available from the Tribunal's account of the hearing recorded in its reasons. The Tribunal's inquiries at the hearing made plain to the appellant the dispositive issues in relation to the application.

36 Accordingly, there are no grounds to conclude that the Federal Magistrate erred in finding that procedural fairness was not afforded to the appellant. Ground 2 is therefore not made out.

37 Ground 1 of the grounds of appeal is a reference to the Federal Magistrate's consideration of whether or not the appellant fulfilled the criterion for a protection visa set out in s 36(2)(aa) of the Act, referred to by the Federal Magistrate as the complementary protection criterion.

38 Ground 3 is an attack on the same finding in respect of his claim that his fear of "significant harm … at the hands of the GANGS and other people acting independent of government [in New Zealand]" is "in accordance with the provisions [of] section 36(2)(aa) of the Migration Act…"

39 It is convenient to deal with Ground 3 first.

40 The Tribunal found that there was no real chance that the appellant faced the risk of gang violence, other than the risk of random and non-selective violence faced by the population of New Zealand generally. That finding of fact was clearly open to it. There is however no explicit finding that the random risk of the appellant's facing gang violence does not attract s 36(2)(aa) circumstances. The Tribunal noted generally that it is "not satisfied that the information before it is sufficient to establish that [s 36(2)(aa) is satisfied]." As the Federal Magistrate noted at [43], the lack of a specific finding on this issue discloses no error on the Tribunal's part, as "no jurisdictional error is made when a Tribunal makes findings at a higher level of generality that are capable of dealing with more specific claims that have been made": see *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [91] per McHugh, Gummow and Hayne JJ.

41 The Federal Magistrate at [58] concluded that the risk of gang violence faced by the appellant did not satisfy the s 36(2)(aa) criterion. That conclusion is clearly correct. A risk of significant harm will not be a "real risk" for the purposes of s 36(2)(aa) if it is a risk "faced by the population of the country generally and … not faced by the non-citizen personally". That language mirrors the Tribunal's finding. The risk of gang violence was therefore not a "real risk" for the purposes of s 36(2)(aa), and so the s 36(2)(aa) criterion was not satisfied. Moreover, as the Federal Magistrate found at [59]:

> In addition, the Tribunal found that there was no evidence to support the applicant's claim that the New Zealand authorities could not or would not protect him. As such, the exception in s.36(2B)(b) of the Migration Act operates such that there is taken not to be a real risk that the person will suffer "significant harm" for the purposes of s.36(2)(aa) and (2A).

42 Ground 3 of the appeal is therefore not made out.

43 It remains to consider whether the Federal Magistrate erred in any other respect in his analysis or application of the term "significant harm" as defined by s 36(2A) for the purposes of s 36(2)(aa) as otherwise s 36(2B)(c) would operate.

44 The meaning of that term was primarily considered by the Federal Magistrate at [60]-[67] of his judgment in relation to the question of whether forced separation from one's children could be considered "significant harm". If separation from one's children could

constitute "significant harm", it must be by being "cruel or inhuman treatment" or "degrading treatment": s 36(2A). The other categories of "significant harm" are obviously inapplicable, and (as has been noted above) s 5(1) of the Act makes clear that the listed categories of "significant harm" are exhaustive.

45 "Cruel or inhuman treatment" is defined in s 5(1) of the Act as follows:

> …an act or omission by which:
>
> (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
>
> (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;
>
> but does not include an act or omission:
>
> (c) that is not inconsistent with Article 7 of the Covenant; or
>
> (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

46 "Degrading treatment" is defined in the same section as follows:

> … an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omissions:
>
> (a) that is not inconsistent with Article 7 of the Covenant; or
>
> (b) that causes, and is intended to cause, extreme humiliation arising only from,
>
> inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

47 It should be noted here that only an "act or omission" will fall within either of the above definitions. Being separated from one's children is, in the present context, not an act or omission but a consequence of an act. The relevant act is the act of removal from Australia. The separation from his children is said to be the cruel, inhuman or degrading treatment.

48 The Federal Magistrate concluded that forced removal from one's children in Australia by the Australian government could not be considered cruel, inhuman or degrading treatment so as to constitute "significant harm" for the purposes of s 36(2)(aa) of the Act for four main reasons:

1. The text of s 36(2)(aa) (which refers to Australia's "protection obligations"), and the Explanatory Memorandum associated with the Bill that introduced s 36(2)(aa) (*Migration Amendment (Complementary Protection) Bill 2011: Explanatory Memorandum*, House of Representatives [65]), make it clear that the purpose of s 36(2)(aa) is to ensure Australia complies with its "non-refoulement obligation" that arises from Articles 2 and 7 of the 1966 *International Covenant on Civil and Political Rights* and associated jurisprudence of the United Nations Human Rights Committee. That obligation is an obligation not to remove anyone from Australia to a country where there are substantial grounds for believing that there is a real risk that the person will suffer "irreparable harm". The obligation is therefore clearly an obligation to protect non-citizens from harm faced in the receiving country. Being removed from one's children cannot be characterised as a harm faced in the receiving country.

2. Section 36(2B) sets out the circumstances where a non-citizen should be taken not to be at a real risk of significant harm for the purposes of s 36(2)(aa); for instance, where the non-citizen is reasonably able to relocate to another part of the receiving country where there would be no real risk of significant harm: s 36(2B)(a). These "exceptions" only make sense if the legislature intended that the "significant harm" occurs only in the receiving country.

3. To satisfy s 36(2)(aa), the real risk of significant harm must arise "as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country". The fact that the significant harm must be a consequence of the removal strongly suggests that the removal itself cannot be the significant harm.

4. With respect to "degrading treatment", forced separation from one's family by removal from Australia cannot constitute "degrading treatment" as defined in s 5(1). "[D]egrading treatment" is an act or omission that, inter alia, is "intended to cause" extreme humiliation and, the Federal Magistrate said, separation from one's family is a *consequence* of the act of removal from Australia and "… a consequence cannot be said to have an intention to cause a result (which it itself constitutes)", so the act of removal itself cannot be said to be "perpetrated by the State with the intention to cause extreme humiliation that is unreasonable": at [65].

49 In my view, that reasoning is not shown to be erroneous. An interpretation of the legislation that incorporates removal from one's family by the Australian government as

"significant harm" would be an extremely strained reading, and one not in accordance with the clear intention of Parliament in enacting the complementary protection criterion. That intention was to honour Australia's non-refoulement obligation. In short, the appellant has failed to identify or demonstrate any error in the application of the term "significant harm" by the Federal Magistrate. Specifically in relation to the findings made by the Tribunal that harm feared by the appellant from gangs and other unidentified people in New Zealand does not meet the threshold of "significant harm" in s 36(2A) of the Act, and does not represent in any event fear of harm for a Convention reason, and that the removal of the appellant from Australia to New Zealand with the consequence of the separation from his children or its effects does not constitute "significant harm" as defined, no error is shown.

50 The appeal is therefore dismissed. The appellant must pay to the first respondent costs of the appeal.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 6 August 2013