FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZPZY v MINISTER FOR IMMIGRATION & ANOR *[2011] FMCA 463*

MIGRATION – Persecution – review of recommendation made by Independent Merits Review ("IMR") that the applicant not be recognised as a person to whom Australia has protection obligations – allegation that the IMR denied the applicant natural justice by reason that the IMR ignored information, failed to consider applicant's membership of a particular social group and impermissibly applied a purported rule when reaching his decision.

The Constitution, s.75
Migration Act 1958, ss.5, 36, 46A, 91R, 195A, 476

Plaintiff M61/2010E v Commonwealth of Australia
Plaintiff M69 of 2010 v Commonwealth of Australia (2010) 85 ALJR 133

Applicant:	SZPZY
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	DAVID CONNOLLY
File Number:	SYG 435 of 2011
Judgment of:	Cameron FM
Hearing date:	16 June 2011
Date of Last Submission:	16 June 2011
Delivered at:	Sydney
Delivered on:	27 June 2011

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents: Australian Government Solicitor

ORDERS

(1) The application be dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 435 of 2011

SZPZY
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

DAVID CONNOLLY
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant, who claims to be a stateless Faili Kurd, arrived by boat on Christmas Island on 23 January 2010. On 27 March 2010 he lodged an application for a Refugee Status Assessment ("RSA") alleging that he was a refugee and, as such, was a person to whom Australia had protection obligations under the *United Nations Convention relating to the Status of Refugees 1951* as amended by the *Protocol relating to the Status of Refugees 1967* ("Convention"). He is currently in immigration detention and, it may be presumed, has been so since he landed at Christmas Island. On 13 May 2010 he was assessed by a delegate of the first respondent ("Minister") as not meeting the definition of a "refugee" under the Convention. He sought a review of that decision and on 11 February 2011 the second respondent ("IMR"),

in his capacity as independent merits reviewer, recommended that the applicant not be recognised as a person to whom Australia has protection obligations under the Convention.

2. The applicant has made an application to this Court for judicial review of the IMR's decision. He has sought a declaration that the IMR's decision is affected by legal error, an order that the matter be remitted to be determined according to law and an injunction restraining the Minister's officers from removing him from Australia. The Court's jurisdiction to consider the application was not challenged by the Minister or the IMR and it is apparent, by reason of the prayer for an injunction against the Minister's officers, that the Court does have jurisdiction in this matter: s.476(1) *Migration Act 1958* ("Act"), s.75(v) Constitution.

3. Although it was left unstated, it can be inferred that the applicant landed at Christmas Island without a visa. Section 5(1) of the Act provides that Christmas Island is an "excised offshore place". Consequently, the applicant is an "offshore entry person" as defined by s.5(1) who, in the circumstances and as provided by s.46A(1) of the Act, cannot make a valid application for a protection visa. However, ss.46A and 195A of the Act also provide that the Minister may, in his discretion, lift the bar on the applicant making such an application and may grant him a visa. Relevantly, those sections provide:

> ***46A Visa applications by offshore entry persons***
>
> *(1) An application for a visa is not a valid application if it is made by an offshore entry person who:*
>
> *(a) is in Australia; and*
>
> *(b) is an unlawful non-citizen.*
>
> *(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.*
>
> *(3) The power under subsection (2) may only be exercised by the Minister personally.*

...

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

195A Minister may grant detainee visa (whether or not on application)

Persons to whom section applies

(1) This section applies to a person who is in detention under section 189.

Minister may grant visa

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

(4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

(5) The power under subsection (2) may only be exercised by the Minister personally. …

4. It was an unstated assumption in these proceedings that the Minister would consider exercising his ss.46A and 195A discretions in favour of the applicant if he received advice to that effect, advice which would be based on the recommendation of the IMR: see *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 85 ALJR 133 at 143 [49]; and that the applicant's right

to bring these proceedings arises out of the High Court's decision in that case. In *Plaintiff M61* it was held that an offshore entry person such as the applicant who seeks to engage Australia's protection obligations under the Convention, and is detained by the Commonwealth pending the outcome of that process, must be afforded natural justice by the independent merits reviewer reviewing his case. That right requires the reviewer to conduct a review which is procedurally fair and which correctly addresses the relevant legal question or questions.

5. For the reasons which follow, the application will be dismissed.

Background facts

6. The facts alleged in support of the applicant's claim for protection are set out on pages 3-9 of the IMR's decision record. Relevant factual allegations are summarised below.

Entry interview

7. The applicant made the following claims during his "entry interview" on 13 February 2010:

    a) his parents were born in Iraq but were expelled from the country in 1980 because they were Shiite Faili Kurds;

    b) his family moved to Iran, where he was born, but lived there illegally and without documentation. They never attempted to obtain a green or white card (i.e. residency cards legalising their status in Iran) because they feared deportation;

    c) as undocumented Faili Kurds, he and his family were subjected to harassment and mistreatment by the Basij (an Iranian Islamic militia force) and were denied basic benefits such as education, health and protection;

    d) he saw no prospect of legalising his status in Iran and decided to leave for a country where he would be accepted and recognised; and

    e) he travelled from Iran on 13 January 2010 using a false Iranian passport obtained through a smuggler for US$8,000.

RSA interview

8. The applicant was interviewed on 30 March 2010 for the purposes of his RSA. He made the following additional claims:

   a) his father once tried to regularise their status in Iran by applying for documentation. It was refused and he was threatened with deportation so he did not try again;

   b) because of his father's experience, he did not try to obtain a white card for himself. In any event, they were "worthless" because card holders were still harassed by the Basij;

   c) he completed five years of "Nezhat" education, a literacy and numeracy program run by volunteers. He discontinued his studies because his father could not afford the tuition fees and only wanted him to have a basic education;

   d) his family were denied access to public health facilitates. They had to use private clinics which were much more costly;

   e) he worked in the Tehran bazaar as a labourer in the three years prior to his departure from Iran. However, because he had no work permit his average earnings were less than Iranian or Iranian Kurdish workers;

   f) when he was 18 years old and working as a fruit seller he was stopped by the Basij and asked for his identification. Unable to comply, his fruit was confiscated;

   g) in 2007 he was kicked and slapped by the Basij because he had no identification; and

   h) he left Iran illegally on a false passport and feared that on his return he would be arrested as a spy.

Interview before the IMR

9. At his interview before the IMR the applicant essentially repeated the claims which he had made during his entry and RSA interviews.

IMR's findings and reasons

10. After discussing the claims made by the applicant and the evidence before him, the IMR found that the applicant did not meet the criteria for the grant of a protection visa as set out in s.36(2) of the Act. The IMR consequently recommended that the applicant not be recognised as a person to whom Australia has protection obligations under the Convention. That decision was based on the following findings and reasons:

    a) the IMR accepted that the applicant was born in Iran of parents who were, at the time of his birth, stateless Faili Kurds. He also accepted that the applicant and his immediate family had been living in Iran with no documentation. In the circumstances, the IMR was satisfied that the applicant did not have Iraqi or Iranian nationality and therefore assessed his claims for refugee status against the country of his former habitual residence, Iran;

    b) the IMR accepted that the Iranian government applied a range of policies which were restrictive on the lives of refugees but found that discrimination or differentiation between the rights and benefits available to citizens and non-citizens did not necessarily amount to persecution for the purposes of the Convention. However, the IMR also noted that, pursuant to s.91R(2) of the Act, discrimination which creates significant economic hardship which threatens a person's capacity to subsist or earn a livelihood or which amounts to a denial of access to basic services might amount to persecution if it is imposed for a Convention reason;

    c) the IMR accepted that the applicant (and other undocumented Faili Kurds, refugees and migrants with or without nationality) did not have equal access to services in Iran as was available to Iranian citizens but found that such discrimination did not constitute "serious harm" as defined by s.91R(2) of the Act amounting to persecution under the Convention. The IMR made the following findings in this connection:

        i) the IMR accepted that the applicant, as a "non-citizen" and an undocumented refugee, would not be able to obtain a formal marriage certificate and would not be able register the birth of his children in Iran. However, the IMR found

that, while discriminatory, these measures were in accordance with Iranian law and did not involve serious harm as defined in the Act;

ii) the IMR accepted that the applicant was denied access to formal free education in Iran but found that this was principally because he was an undocumented refugee and not because he was an ethnic Faili Kurd. The IMR found that, in any event, the applicant had not been deprived of all education as he gave evidence that he had attended an educational program from the age of 8 or 9 to the age of 13 or 14, following which he commenced work. The IMR found that while the applicant's lack of formal education would reduce his future employability, it did not deprive him of his ability to subsist;

iii) the IMR accepted that the applicant was denied access to "lawful" employment because he did not have a white card and was underpaid compared to Iranian citizens and white card holders. However, given that the applicant had worked continuously since the age of 13/14 and, according to country information, the Iranian authorities more or less turned a "blind eye" to Faili Kurd refugees working in a range of designated fields, the IMR found that on his return to Iran the applicant would be able to find employment commensurate with his previous experience and he would not therefore be denied the ability to subsist; and

iv) the IMR accepted that the applicant was denied access to certain health care services but was not satisfied that his ethnicity was the essential and significant reason for this. The IMR noted in this connection that many countries restricted free or subsidised services to non-nationals on the basis of perceived greater obligations towards its nationals and he was not satisfied that the motivation behind Iran's laws was any different;

d) the IMR accepted that the applicant had been harassed by the Basij on two occasions but was not satisfied that the essential and significant reason for his punishment was because he was a Faili

Kurd or an undocumented refugee or because he was a member of a particular social group. The IMR found that the essential and significant reason for the punishment dealt to him by the Basij was because he was in breach of the Basij's ideas of law and morality and that, had he been an Iranian citizen, he could have been treated in the manner for the same reasons. The IMR was not satisfied that the applicant had been subjected to continuous harassment, bullying or extortion by the Basij in Iran because he was an undocumented Faili Kurd;

e) the IMR did not accept that the applicant's use of a false Iranian passport would lead to his persecution or that on his return to Iran he would be labelled a "spy" as he did not find any credible evidence to support these claims;

f) the IMR did not accept that the applicant's inability to obtain nationality or formal legal status in Iran amounted in itself to persecutory conduct. He noted in this connection that Iran had, as with many countries, established a set of criteria which applicants for citizenship were required to meet and which were designed to distinguish between the nationals and non-nationals of the country, not to persecute non-nationals. The IMR also noted that the applicant had not availed himself of the various opportunities to formalise his status in Iran; and

g) the IMR found that the applicant had a right to claim Iraqi citizenship and that, if granted, he would be able to reside there. He accepted that security issues remained in Iraq but found that this was an insufficient reason for the applicant not to assert his claims in preference to seeking asylum in a third country.

Proceedings in this Court

11. The grounds of the application commencing these proceedings were pleaded as follows:

> *1. The IMR erred when it ignored crucial information in paragraph 72 that* "neither he [the applicant] nor his parents or close relatives have any documentation" *and, therefore, that the applicant failed to have the prerequisite of a stateless person in the applicant's situation if he were to attempt to apply for a nationality certificate in Iraq. …*

2. *The IMR erred when it focussed almost entirely on the applicant's group as Faili Kurd and failed to make findings relating to the applicant belonging to the particular social group of stateless persons without documents born in Iran to parents without documents born in Iraq and who, as a consequence, face the risk of deportation from Iran to Iraq (paragraph 66, page 12 IMR Decision) where they had no certainty of safety and no possibility of acquiring nationality (Ground 1 above).*

3. *The IMR Reviewer erred when, without questioning the applicant to what extent he and his family were part of a close-knit refugee community in Tehran, he raised to the status of a rule that applied to the applicant, the broad generalisation that:*

> … close-knit refugee communities world-wide, especially in a capital city like Tehran, are vitally interested in any legal changes which may advance or retard their situation in the host country. I do not accept that Faili Kurds, even with limited education, would be exceptions to this rule, nor do I accept the claimant's agent's assertion, not supported by UNHCR evidence, that the authorities failed to advertise these citizenship changes widely among refugee population … (paragraph 77)

Even without the information which should have been elicited by questioning the applicant, the Reviewer did include in the country information that in Iran the "preference for camps often makes refugees in cities (both new arrivals and those who have lived there for many years) extremely vulnerable to police abuse and discriminatory treatment" *(last paragraph page 14, IMR). This information should have alerted the Reviewer to the danger of refugees in Tehran without documents having to be extremely careful to appear as part of the Iranian population and avoid operating as part of a close-knit refugee community without documents.*

Instead the Reviewer stated that "I have not given weight to the claimant's explanation that he was unaware of his potential rights to either Iranian or Iraqi citizenship".

(italics in original)

IMR ignored information

12. The applicant alleges that the IMR ignored his accepted lack of documentation when concluding that he had failed to meet the test of a stateless person were he to apply for Iraqi citizenship. However, that is what the IMR did find when he wrote:

> *In the particular circumstances of this claimant and on the basis of his evidence, I have found that he would have a right to apply for either Iranian or Iraqi citizenship, or even dual citizenship. However, whether such applications would be practical or successful cannot be assumed in advance owing to his claim that he and his family are undocumented. I am satisfied that he does not currently have the nationality of Iraq or Iran.* (para.78)

13. The IMR found that the applicant was not a national of either of the two countries of which he might have been a citizen. The fact that in paragraphs preceding the paragraph quoted above the IMR essentially rejected the applicant's claim to have been ignorant of his potential rights to Iraqi and Iranian citizenship does not detract from its relevant finding that he did not, in fact, possess citizenship of either country. As a result, the IMR did not err as alleged in the first ground of the application.

Failure to consider applicant's membership of a particular social group

14. The second ground of the application alleges that the IMR failed to identify the applicant as being a member of a particular social group and failed to consider his claim to fear persecution in the context of his membership of that group. The group in question was said to be "stateless persons without documents born in Iran to parents without documents born in Iraq and who, as a consequence, face the risk of deportation from Iran to Iraq … where they had no certainty of safety and no possibility of acquiring nationality".

15. The applicant did not identify where or how a claim to membership of such a group had been advanced by him before the IMR, or at any earlier time, or why his membership of that group should have been sufficiently apparent to the IMR that he should have considered it to be part of the applicant's claims. It appears that the description of this group is drawn from the description of Faili Kurds set out in advice obtained from the Department of Foreign Affairs and Trade and

reproduced at para.66 of the IMR's decision. If so, then the particular social group which the applicant now identifies was sufficiently considered by the IMR when he considered the applicant's claims by reference to that group.

16. However, the particular social group which the applicant has identified in the second ground of his application is not restricted to Faili Kurds and could be comprised of people from a number of ethnic or national backgrounds. The evidence does not support a conclusion that the applicant, at any time, articulated or intimated a claim based on membership of such a group, beyond his membership of the particular social group of Faili Kurds. Nor does such a claim arise tolerably clearly from the allegations which the applicant did make. Indeed, in their submissions to the IMR, the applicant's migration agents summarised his claim to fear persecution in Iran in the following terms:

> … *we submit that the claimant is … able* [to] *demonstrate a well-founded fear of persecution in Iran on the basis of his ethnicity, imputed political option as pro-Kurdish, and as an Iraqi refugee or as someone perceived to be of Iraqi nationality.*

17. For these reasons, the second ground of the application does not support a finding that the IMR erred.

Impermissible application of purported rule

18. In the third ground of his application the applicant has alleged that the IMR's finding that close-knit refugee communities are vitally interested in legal changes which may advance or retard their situation in their host country amounted to a "rule" against which the applicant's situation was tested. What the applicant is really challenging is the IMR's decision to give no weight to his allegation that he was unaware of his potential rights to either Iranian or Iraqi citizenship or to his assertion that he was unaware of anyone who had made such a claim. However, it has not been demonstrated that the IMR's understanding of the behaviour of close-knit refugee communities was unsupported by evidence. In such circumstances, I do not find that the Tribunal's implicit rejection of the applicant's evidence was erroneous because it lacked any evidentiary basis.

19. But, in any event, the relevant question decided by the IMR was not whether the applicant was to be believed in his claims to have been unaware of his rights to claim citizenship or his knowledge of others who had pursued it, but whether he was, in fact, a citizen of Iran or Iraq. The part of the IMR's decision in which the issues raised by the applicant in his third allegation appeared was concerned with identifying the country against which the applicant's claim to have a well-founded fear of persecution was to be considered. The IMR discussed the applicant's personal history and referred to the citizenship laws of Iran and Iraq concluding that, although success was far from assured, he was entitled to apply for either or even both but that, nevertheless, he had neither. Having made that finding, the IMR proceeded to assess the applicant's claims in relation to Iran as the country of his previous habitual residence.

20. It can therefore be seen that the applicant's knowledge of whether he was entitled to apply for Iranian or Iraqi citizenship, and the IMR's findings in that connection, were of no relevance to the issue which the latter was addressing at that point of his reasons, which was whether Iran or Iraq was the appropriate country of reference for the purposes of the applicant's claim to have a well-founded fear of persecution.

Conclusion

21. The applicant has not demonstrated that the IMR's decision is affected by legal error.

22. Consequently, the application will be dismissed.

I certify that the preceding twenty-two (22) paragraphs are a true copy of the reasons for judgment of Cameron FM

Associate:

Date: 27 June 2011