FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZJKO & ANOR v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 370

MIGRATION – Visa – protection visa – Refugee Review Tribunal – application for review of decision of Refugee Review Tribunal affirming decision not to grant protection visa – citizens of Philippines claiming fear of persecution from corrupt officials – Part D applicant – where applicant claimed as a member of husband's family unit – where Tribunal considered evidence of a refugee claim by the applicant wife in her own right – no jurisdictional error in relation to the applicant husband – jurisdictional error in relation to the applicant wife – discretionary nature of relief – no utility in granting relief to applicant wife – application dismissed.

Migration Act 1958 (Cth) ss.36, 48A, 48B, 91R, 91X, 424A, 425A, 474
Migration Regulations 1994 (Cth) Schedule 2 Part 866

WAEE v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 184 referred to.
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389 referred to.
Lee v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 464 referred to.
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 referred to.
NAHI v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 10 referred to.
SZGSI v Minister for Immigration & Citizenship [2007] FCAFC 110 referred to.
V120/00A & Ors v Minister for Immigration & Multicultural Affairs (2002) 116 FCR 576; [2002] FCA 264 followed.
NAEA of 2002 v Minister for Immigration & Multicultural & indigenous Affairs [2003] FCA 341 followed.
SZLGF & Anor v Minister for Immigration & Anor [2008] FMCA 254 followed

First Applicant: SZJKO

Second Applicant: SZJKP

First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3009 of 2007
Judgment of:	Scarlett FM
Hearing date:	12 March 2008
Date of Last Submission:	12 March 2008
Delivered at:	Sydney
Delivered on:	31 March 2008

REPRESENTATION

Applicants:	Appeared in person
Solicitors for the Applicant:	Not legally represented
Counsel for the Respondent:	Mr Knackstredt
Solicitors for the Respondent:	Clayton Utz

ORDERS

(1) The Application is dismissed.

(2) The First Applicant is to pay the First Respondent's costs fixed in the sum of $5,000.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3009 of 2007

SZJKO
First Applicant

SZJKP
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. The Applicants, who are citizens of the Philippines, ask the Court to set aside a decision of the Refugee Review Tribunal made on 22nd August 2007. The Tribunal affirmed a decision of the delegate of the Minister not to grant the Applicants protection visas.

2. The Applicants claim that the evidence they presented to the Tribunal appears to have been ignored. They do not set out in their application what orders they seek, but presumably they ask for orders in the nature of certiorari and mandamus, setting aside the Tribunal decision and remitting their applications to the Tribunal for determination according to law.

Background

3. The Applicants, who are a married couple, arrived in Australia on 11th February 2006. They applied for Protection (Class XA) visas on 22nd March 2006.

4. The First Applicant, the husband, completed a Form 866C, which is headed "Application for an applicant who wishes to submit their own claims to be a refugee". The First Applicant set out his claim for protection based on endemic institutionalized corruption in the Philippines. The husband's application also referred to a claim by the wife, saying that she "has similar claims. Two businesses conducted have had to close as a result of corruption by outside businessmen".[1]

5. Notwithstanding this separate claim referred to in the husband's application, the wife, the Second Applicant, completed a Form 866D, which is headed "Application for a member of the family unit". The form contains the following instruction:

> *This part is for a member of the family unit who does NOT have their own claims to be a refugee, but is included in this application.*
>
> *If you do have your own claims to be a refugee complete a part C instead.*[2]

6. The husband's application nominated a solicitor as the person to act and receive communication.[3]

7. The Minister's delegate considered the claim and noted that:

> *The spouse had also been the victim in regard to a small business she operated.*[4]

8. The delegate found that the First Applicant claimed to be a person to whom Australia has protection obligations under the Refugees Convention and made specific claims under the Convention. The delegate also found that the Second Applicant claimed to be the spouse of the First Applicant, a person who had made specific claims under the

[1] See Court Book at 19-20.
[2] The Second Applicant's Part D application is to be found at pages 28 to 35 of the Court Book.
[3] Court Book 38
[4] Court Book 44

Refugees Convention and was an applicant for a Protection (Class XA) visa.

9. The delegate noted that the First Applicant claimed to fear persecution in the Philippines because of government corruption and the NPA and that this harm involved serious harm and systematic and discriminatory conduct as outlined in s.91R of the Migration Act. The delegate also found that the convention grounds of imputed political opinion and possibly membership of a particular social group were the essential and significant reasons for the harm feared. Therefore the delegate found that the First Applicant feared persecution for a Convention reason.[5]

10. The delegate then turned to the question of whether the Applicant's fear was well-founded. After consulting Independent Country Information, the *United States Department of State Country Report on Human Rights Practices for 2005,* the delegate found that corruption affected many people in the Philippines and remained a major problem. The delegate found, however, that:

> *There is no information to suggest that corruption within government is selectively applied against particular persons or groups in Philippines society that would support a finding that it amounts to anything other than low level generalised discrimination at most.*[6]

11. The delegate went on to find that the First Applicant had not provided any detail about his claims, but had provided only basic information and no supporting evidence. The delegate found:

> *I do not accept the unsubstantiated claims as credible and I do not accept that the applicant*[7] *has provided an honest account of his personal circumstances prior to his departure from the Philippines. This leads me to conclude that the applicant has fabricated a set of claims for himself for the sole purpose of engaging Australia's protection obligation.*[8]

12. The delegate was not satisfied that the First Applicant had a well-founded fear of persecution on account of any Convention reason, at that time or in the reasonably foreseeable future. The delegate decided

[5] Court Book 47-48
[6] Court Book 49
[7] *i.e.* the First Applicant
[8] Court Book at 49-50

that he was not satisfied that the First Applicant was owed protection obligations for the purposes of s.36 of the Migration Act. The delegate found that the First Applicant did not meet the criteria prescribed in section 36(2) of the Migration Act and the Migration Regulations 1994, Schedule 2, Part 866 or Part 785 and refused to grant the First Applicant a Protection (Class XA) visa.

13. The delegate then found that, because the First Applicant had not been granted a Protection visa, he was satisfied that the Second Applicant had not met the criteria prescribed in s.36(2) of the Migration Act and the Migration Regulations, Schedule 2, Part 866 or Part 785. The delegate therefore refused to grant a Protection (Class XA) visa to the Second Applicant.[9]

14. The decision to refuse the visa was made on 6th June 2006.

Application for Review by the Refugee Review Tribunal

15. The Applicants' solicitor then lodged an application to the Refugee Review Tribunal for review of the delegate's decision on 20th June 2006. The application for review was accompanied by a letter from the solicitor dated 9th June 2006, although it was not received by the Tribunal until 20th June 2006.

16. In that letter, the solicitor referred to the "Applicant's" claim, meaning the First Applicant's claim. He then went on to refer to the Second Applicant, saying:

> *In the case of the spouse, (SZJKP)*[10]*, the claims essentially are similar, but more severe. She instructs, as previously stated, that her uncle…was murdered as a result of failure to comply with the extortion demands of the NPA. It is relevant that she perceives that she has lost her businesses as a result of unfair economic competition created by virtue of corruption which allows the development of other larger businesses for example, with Government concessions.*[11]

17. The Tribunal wrote to the Applicants on 3rd August 2006, inviting them to attend a hearing to take place 22nd August. The Applicant's solicitor

[9] Court Book at 50
[10] The name is not published to comply with s 91X of the Migration Act.
[11] Court Book at 51

wrote to the Tribunal, advising that they would attend the hearing. In his letter, the solicitor referred to the violent death of the wife's uncle.

18. The Applicants attended the hearing and produced their passports, as well as a number of other documents. They both gave evidence with the assistance of a Tagalog interpreter.

19. The Tribunal handed down its decision on 12th September 2006.

The First Refugee Review Tribunal Decision

20. In the Tribunal Decision Record[12] the Tribunal noted that:

> *The Applicant wife was identified to DIMA as a Part D applicant, i.e., having no claims of her own, the fate of her application depending on the outcome of the applicant husband's case. The Applicant wife nevertheless gave evidence on her own behalf in the RRT hearing and the Tribunal took this into account.*[13]

21. The Tribunal noted that both Applicants gave evidence about the wife's uncle having been killed, possibly by disaffected sacked workers of his business. The Tribunal was not satisfied that the First Applicant had suffered detriment and disadvantage from having to pay "kickbacks" but did not accept that this form of exploitation amounted to persecution. The Tribunal also found that the evidence of the First Applicant lacked credibility.[14]

22. The Tribunal was not satisfied that the Applicants faced a real chance of persecution in the Philippines, let alone one that could be called Convention-related and that their claimed fear of Convention-related persecution was not well-founded.

23. The Tribunal was not satisfied that the First Applicant was a person to whom Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol and therefore he did not satisfy the criterion set out in s.36(2) for a protection visa.

24. The Tribunal then went on to find:

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[12] A copy of which appears in the Court Book at pages 90 to 96
[13] Court Book at 91
[14] Court Book at 95

> *As the Applicant husband cannot be granted a protection visa, it follows that the Applicant wife cannot satisfy the alternative criterion set out in s 36(2)(b) and cannot be granted a protection visa.*[15]

25. The Tribunal affirmed the delegate's decision not to grant the Applicants Protection (Class XA) visas.

26. The Applicants sought judicial review of that decision in the Federal Magistrates Court. On 16th March 2007 Nicholls FM made orders by consent issuing a writ of certiorari quashing the Tribunal decision. His Honour also issued a writ of mandamus requiring the Tribunal to redetermine the matter according to law.

27. The reason given was jurisdictional error in the form of a failure to comply with s.425A of the Migration Act, by failing to give the Applicants notice within the prescribed period.

28. The matter was remitted to the Refugee Review Tribunal.

29. The Tribunal wrote to the Applicants on 22nd May 2007, inviting them to attend another hearing on 27th June 2007. Both Applicants attended the hearing, they and they both gave evidence.

30. The Tribunal handed down its decision on 11th September 2007.

The Second Tribunal Decision

31. The Decision Record of the second Tribunal[16] referred to the evidence taken at the earlier Tribunal hearing as well as the Applicants' evidence to the second Tribunal. The Tribunal described the Second Applicant's evidence about her claim for protection arising out of businesses run by her father and uncle.

32. The Tribunal also considered Independent Country Information about corruption in the Philippines and the New People's Army.

[15] Court Book 96
[16] at Court Book 156-175

33. The Tribunal's Findings and Reasons[17] refer to claims for protection by the husband and the wife. The Tribunal described the husband's claim as this:

> *Essentially the husband claimed that he feared persecution because, particularly working as a contractor in the building industry, he was asked to pay bribes by government officials to secure work.*[18]

34. The Tribunal then described the wife's claim:

> *The wife claimed that she feared persecution by the NPA because in 1995 they demanded military boots and uniforms and in 1997 her uncle was shot because he sacked workers who might have belonged to the NPA. She also claimed that that her uncle may have been shot because he failed to pay tribute money and that the NPA harassed them because 'people knew that her uncle was a very rich person'.*[19]

35. The Tribunal found that the Applicants could not be distinguished from the rest of the community and therefore did not fall within the definition of a 'particular social group'. The Tribunal also found that persecution on the basis of being particularly vulnerable, because they were not strong or popular in their town, they belonged to a small family and were poor, was not a Convention related reason.

36. The Tribunal considered the First Applicant's claim to have been threatened with guns and punched by government officials, even if the incidents had occurred, arose because the corrupt officials perceived him to have money and not for any Convention related reason.

37. The Tribunal considered the Second Applicant's claim that she feared persecution by the NPA. The Tribunal found:

> *The Tribunal accepts this is the case but again the Tribunal finds that the applicant's fear of persecution is not for any Convention related reason, but simply, as stated by the wife, because they were perceived to be wealthy.*[20]

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[17] Court Book 171-175
[18] Court Book 171
[19] Court Book 171
[20] Court Book 173

38. The Tribunal then went on to consider a claim made by the Second Applicant that she had been harassed by the NPA at home on about 5 occasions. The Tribunal was not satisfied that those incidents had occurred but, even if it gave the Applicants the benefit of the doubt, found that the claimed persecution was because the Applicants were related to the wife's late uncle "and/or because they were perceived to have money, and not for any Convention related reason".[21]

39. The Tribunal considered the Applicants' claim to have been harassed for money after they started talking to other people about corruption and bribery. The Tribunal found:

> *The Tribunal is not satisfied that the applicants 'exposed' corruption such that their views were effectively an expression of their political opinion against corruption to make any fear on the basis of political opinion well founded. The Tribunal therefore finds that the applicants do not have a well founded fear of persecution for the reason of political opinion.*[22]

40. The Tribunal then made these conclusions:

> *Having considered the evidence as a whole, the Tribunal is not satisfied that the applicants are persons to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) for a protection visa. Nor can they satisfy the alternative criterion in s.36(2)(b) and therefore cannot be granted protection visas.*

41. The Tribunal affirmed the decisions not to grant the Applicants protection visas.

Application for Judicial Review

42. The Applicants commenced proceedings on 28th September 2007 by filing an application and an affidavit in support. They have not set out the orders that they seek, but clearly they seek relief by way of Constitutional writs.

43. The Applicants give the following grounds in their application:

> *1. Seeking for judicial review.*

[21] Court Book 173
[22] Court Book 173

2. We appeal to the Court to make a further review of our case.

3. Because the evidence we have presented appears to have (been) ignored by the RRT.

44. The Applicants make a similar claim in the affidavit of the First Respondent.

Submissions

45. The Applicants did not file any written outline of submissions, but they attended Court and made oral submissions. The First Applicant told the Court about his experiences as a contractor in the Philippines and being subject to extortion by corrupt officials. His submissions related only to factual matters and a challenge to the Tribunal's factual findings.

46. The Second Applicant told the Court that she had a different case from her husband. She said that her case arose from her father and her uncle. She, too, made submissions entirely based on factual matters and sought to challenge the Tribunal's factual findings.

47. Counsel for the First Respondent, the Minister for Immigration and Citizenship, submitted that, in the absence of particulars, the only ground alleged is that the Tribunal failed to consider the Applicants' claims. He submitted that this ground cannot be made out.

48. Counsel for the Minister submitted that the Tribunal set out the Applicants' claims in detail, considered them, and made findings as to the majority of them. It was not necessary for the Tribunal to consider every factual matter specifically, as those specific matters were adequately dealt with by the Tribunal's more general findings. In the light of those findings, he submitted, resolution of the matters of particularity would not have assisted the Applicants' case (*WAEE v Minister for Immigration and Multicultural and Indigenous Affairs*[23]*).*

49. Further, he submitted, there was nothing to support any assertion that the Tribunal failed to consider some integer of the Applicants' claim (*Dranichnikov v Minister for Immigration and Multicultural Affairs*[24]).

[23] [2003] FCAFC 184 at [46]-[47]
[24] (2003) 197 ALR 389 at 407 per Kirby J and at 395 per Gummow and Callinan JJ

50. Whilst the Applicants complain that the Tribunal did not accept their claims, counsel for the Minister submitted that the Tribunal was entitled to determine the weight to be given a particular piece of evidence and whether to accept it or reject it (*Lee v Minister for Immigration and Multicultural and Indigenous Affairs*[25]*).* The findings made by the Tribunal were open to it on the evidence and there is no ground for the Court to disturb those findings (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[26]*; NAHI v Minister for Immigration and Multicultural and Indigenous Affairs*[27]).

51. In response to a question from the Bench about the fact that the Tribunal had considered evidence from the Second Applicant, a Part D Applicant who had not applied for refugee status in her own right, Mr Knackstredt drew my attention to the decision of the Full Court of the Federal Court in *SZGSI v Minister for Immigration and Citizenship*[28])., where the Court considered whether the Refugee Review Tribunal had failed to comply with its obligation to give information under s.424A(1) of the Migration Act where the second appellant had given evidence before the Tribunal which formed part of the reason for affirming the delegate's decision.

52. The relevant facts in *SZGSI* are found in the judgment of Marshall J at [9]-[37]. The appellants were husband and wife. The first appellant, the wife had applied for a protection visa based on a fear of persecution in China on account of her religion. The second appellant, her husband, applied for a protection visa based on his membership of the first appellant's family unit.

53. During the course of the Refugee Review Tribunal hearing, the second appellant gave evidence about having returned to China voluntarily after an earlier visit to Australia and had not suffered harm on account of his religion. He was not making any refugee claims of his own. The Tribunal, in rejecting the appellants' applications, had relied on the second appellant's evidence:

Later in its reasons for decision, the Tribunal said:

[25] [2005] FCA 464 at [27]
[26] (1996) 185 CLR 259 at 272
[27] [2004] FCAFC 10 at [10]
[28] [2007] FCAFC 110

> *The Tribunal is not satisfied that the [first appellant] will face any serious harm as a result of her adherence to Christianity. Of particular relevance is that the [second appellant], who shares the [first appellant's] faith and practices (apart from her "special role"…)* ***returned to China voluntarily in mid-2004, by his own evidence has not suffered any harm as a result of his religion at any time in the past and has no refugee claims with respect to the future.***
>
> *(Emphasis provided)*[29]

54. The information was held to be "information" for the purpose of s.424A (1) of the Act. However, the Full Court held that s.424A(3)(b) did not operate to excuse the Tribunal from giving written notice to the first appellant about its intention to rely on that evidence, even though it came from the second appellant, who was another applicant.

55. The Full Court allowed the first appellant's appeal and set aside the orders of the Federal Magistrate in so far as they related to the first appellant. The Court made an order in the nature of certiorari to quash the decision of the Tribunal in relation to the first appellant and an order in the nature of mandamus in requiring the Tribunal to review according to law the delegate's decision not to grant the first appellant a protection visa.

Further Submissions

56. Counsel for the Minister sought leave to file further written submissions. I granted leave to the First Respondent to file supplementary submissions by 20th March 2008. I also granted leave to the Applicants to file and serve any submissions in reply by 28th March 2008.

57. No submissions have been filed by either party to date

Conclusions

58. In my view, the Tribunal has fallen into jurisdictional error. At all times, the First Applicant was a Part C Applicant, an Applicant who made his own claim to be a refugee. The Second Applicant was a Part

[29] [2007] FCAFC 110 at [35]

D Applicant, a person who made a claim as a member of the First Applicant's family unit. She applied as a person who did not have her own claims to be a refugee, but was included in her husband's application. If she had her own claims to be a refugee, she should have completed a Part C application. The Part D form that she completed makes that quite clear.[30]

59. Despite this, the Second Applicant gave evidence about a refugee claim of her own, both to the first Tribunal and to the Tribunal whose decision is under review. Insofar as the Applicant's evidence about her own claim was concerned, it was irrelevant to the matter that the Tribunal had to decide. Her claim would stand her fall on that of the First Applicant.

60. What the Tribunal appears to have done is to consider both Applicants as if they had their own claims for refugee status under s.36(2) (a) and then, in the alternative, to consider both Applicants as members of each other's family unit under s.36(2) (b).

61. The Tribunal concluded:

> *Having considered the evidence as a whole, the Tribunal is not satisfied that the applicants are persons to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) for a protection visa. Nor can they satisfy the alternative criterion in s.36(2)(b) and therefore cannot be granted protection visas.*[31]

62. What the Tribunal has fallen into error by considering the Applicants against irrelevant criteria.

63. The fact that there are different criteria for protection visas is made clear by the wording of s.36 of the Migration Act:

> *(1) There is a class of visas to be known as protection visas.*
>
> *(2) A criterion for a protection visa is that the applicant for the visa is:*
>
> *(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the*

[30] Court Book 28
[31] Court Book 173-174

Refugees Convention as amended by the Refugees Protocol; or

(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa.

64. It can clearly be seen from the use of the word "or" that the criteria are alternatives. That is not to say, however, that a person cannot qualify under both criteria, but the person must make a separate application.

65. Subclass 866 of Schedule 2 of the Migration Regulations 1994 sets out the criteria to be satisfied at the time of application for a protection visa:

> ***866.211*** *The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:*
>
> *(a) makes specific claims under the Refugees Convention; or*
>
> *(b) claims to be a member of the same family unit as a person (the **claimant**) who:*
>
> *(i) has made specific claims under the Refugees Convention; and*
>
> *(ii) is an applicant for a Protection (Class XA) visa.*

66. The authorities make it clear that there is a fundamental difference for the two bases for a protection visa. In *V120/00A and Others v Minister for Immigration and Multicultural Affairs*[32] the applicants were the widow and children of a man who had sought protection visas for himself and his family. The Minister's delegate refused the application and so the applicant sought review by the Refugee Review Tribunal. The man died shortly before the Tribunal conducted a hearing. The Tribunal affirmed the delegate's decision. The widow and children sought prerogative relief.

67. Kenny J dismissed the application, holding:

[32] (2002) 116 FCR 576

[56] In the present case, it was the deceased who, at the time of application, sought a Protection (Class AZ) visa and who made the specific claims under the Refugees Convention. His wife and children made application for protection visas solely as members of his family.

[57] This is made clear from the different versions of Form 866 completed by the deceased and his family. The deceased completed a Form 866 entitled "Application for an applicant who wishes to submit their own claims to be a refugee". His wife and children completed applications entitled "Application for a member of the family unit", which carried the following notation:

> *This part is for a member of the family unit who does NOT have their own claims to be a refugee, but is included in this application….*

[58] As the respondent's delegate held that the deceased was "not a person to whom Australia has protection obligations under the Refugees Convention", it followed that the delegate found that none of the deceased's family met the criterion in cl 866.222(b) of Schedule 2 of the Regulations. It was this decision that the deceased and his family challenged on review. Was it open to the Tribunal to decide the review application as if each living applicant had made an application for a Protection (Class AZ) visa?

[59] As the Full Court of this Court noted in Li at 535, the Act "places great emphasis on the need for a visa applicant to complete a prescribed application form". The Regulations do not, so it seems to me, permit the Tribunal to treat the applicants as if they had each sought a Protection (Class AZ) visa in her or his own right. As we have seen, the Regulations prescribed the application to be made by a family member of an applicant for a Protection (Class AZ) visa. This is the form that the applicants completed.

[60] In any event, even if it was open to the Tribunal to have considered their applications in this way, a result adverse to the applicants was inevitable. Having completed an application in December 1996 as a family member of an applicant for a Protection (Class AZ) visa (in reliance on criterion 866.221(b)), none of the present applicants would have been able to satisfy the Tribunal that she or he met

criterion 866.222(b), since the principal claimant had died without being granted a Protection (Class AZ) visa…[33]

68. There was a similar factual situation in *NAEA of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs.*[34] The applicant's husband had applied for a protection visa and she made an application for a visa as a member of his family. A delegate of the Minister refused to grant them protection visas, so they applied to the Refugee Review Tribunal for review of the decision. Unfortunately, the applicant's husband died before the Tribunal hearing. The Tribunal conducted a hearing but found that it had no jurisdiction to determine the application for review, following the death of the husband, who was the primary claimant for a protection visa. The applicant sought judicial review of the Tribunal decision.

69. Gyles J dismissed the application and agreed with Kenny J's decision in *V120/00A:*

> *[13] Counsel for the applicant has sought to distinguish the reasoning of Kenny J, which the Tribunal followed, in various ways. It is not necessary to explore all of these arguments, as, in my opinion, one of the strands of her Honour's reasoning is fatal to this application. At all material times, including the time of the original application, the time of the Tribunal decision and the present time, a necessary criterion to be established for the grant of a visa of the type applied for was that the claimant (in this case, the husband) has been granted a protection visa. That criterion has been incapable of fulfilment since the death of the husband on 29 October 2001 (see Kenny J at 590 [60]).*
>
> *[14] …In the present case, it is quite plain that the applicant deliberately applied for a protection visa on the basis that she was a family member of her husband claimant and not in her own right. There is a fundamental difference between the two bases for a protection visa. In my opinion, the Act and the Regulations require separate and specific applications for each. It would not be open for the Tribunal to grant a protection visa to a person who had applied as a family member on the basis that that person was a refugee. I agree with the reasoning of Kenny J in V120/00A at [59].*

[33] (2002) 116 FCR 576 at [56]-[60]
[34] [2003] FCA 341

70. In *SZLGF & Anor v Minister for Immigration & Anor*[35] Nicholls FM considered where a husband and wife applied for protection visas. The husband submitted claims to be a refugee and the wife applied as a member of her husband's family. The applications were refused by a delegate of the Minister. On review by the Refugee Review Tribunal, the Tribunal rejected the claims of the applicant's husband on credibility grounds. At the hearing, however, the wife advanced claims to be a refugee in her own right. The Tribunal considered those claims and dismissed them, finding that her claims arose from the same facts as those of her husband's claims.

71. Nicholls FM, applying *V120/00A* and *NAEA of 2002*, found that the Tribunal had committed jurisdictional error. His Honour held:

> *[52] On the authorities referred to above, the Tribunal was not entitled to proceed in this way. Importantly, however, the Tribunal does not appear to have directed its mind to the relevant criterion relating to the resolution of the applicant wife's application for a protection visa, namely, whether she was a member of the family of a person who had been granted a protection visa because the relevant decision maker had been satisfied that that applicant, in effect, met the Convention definition of "refugee". In my view, had the Tribunal properly addressed this criterion in its analysis, then notwithstanding that it also sought to consider the applicant wife as a refugee claimant in her own right, jurisdictional error may have been avoided.*
>
> *[53] However, the Tribunal did not address the criteria relevant to the disposition of the applicant wife's application. (Section 36(2)(b) of the Act and cll.866.211(b) and 866.222 of Schedule 2 to the Regulations.) In that sense, the Tribunal has committed jurisdictional error in the way in which it resolved the application of the applicant wife…*[36]

72. In my view, the facts in *SZLGF* are similar to the facts in the decision under review and, with respect, I agree with his Honour's reasoning.

73. The Tribunal in the decision under review considered the claims of the First Applicant for refugee status in his own right. The First Applicant made submissions challenging the factual basis of the Tribunal's

[35] [2008] FMCA 254
[36] [2008] FMCA 254 at [52]-[53]

finding, but in my view the Tribunal's findings were open to it on the evidence. The Tribunal was critical of the credibility of some parts of the First Applicant's evidence, but, again, these findings were open to it. There is no jurisdictional error in the Tribunal's finding.

74. Having found that the First Applicant did not meet the criterion set out in s.36(2)(a) for a protection visa, there was nothing further for the Tribunal to do in respect of his claim.

75. However, the Tribunal then considered the First Applicant under the criterion set out in s.36(2)(b). This was both unnecessary and misconceived. The First Applicant had never applied for a protection visa as a member of his wife's family unit, nor had his wife ever applied for a protection visa as a refugee in her own right. The Tribunal embarked on a futile exercise of considering the First Applicant's eligibility for something for which he had never applied as a family member of a person being considered against for which she had never sought to apply.

76. In the case of the First Applicant, the Tribunal had already addressed the correct criterion under s.36(2)(a), so its subsequent consideration of the First Applicant against the criteria in s.36(2)(b), whilst invalid, is of no effect. I am satisfied, relying on the reasoning of Nicholls FM in *SZLGF* at [52], that there is no jurisdictional error in the way in which the Tribunal resolved the application of the First Applicant.

77. In the case of the Second Applicant, however, the Tribunal approached the matter the other way round. The Tribunal considered the Second Applicant against the criterion in s.36(2)(a), that she was making a claim to be a refugee in her own right. This was an error, because the Second Applicant had never applied as a refugee in her own right, notwithstanding the fact that she gave evidence in support of such a claim before the Tribunal.

78. Whilst the Tribunal then made a finding that the Second Applicant did not meet the "alternative criterion" in s.36(2)(b), but the Tribunal did not, in its reasons, set out that the Second Applicant did meet the criteria in s.36(2)(b) because the person on whom her claim relied was not a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

79. Thus, the Tribunal fell into jurisdictional error in dealing with the claim of the Second Applicant.

Discretionary Relief

80. As I have found that the Tribunal decision is affected by jurisdictional error in relation to the claim of the Second Applicant, I considered whether I should grant the relief sought should be granted in her case.

81. As Nicholls FM pointed out in *SZLGF* at [82], relief is discretionary. In my view, relief should not be granted because it would be futile. Even if I were to make orders in the nature of certiorari and mandamus in relation to that part of the Tribunal decision that applies to the Second Applicant, there is nothing to be gained by sending her application back to the Tribunal. An adverse result would be inevitable, because the Second Applicant would not be able to satisfy the Tribunal that she meets the criteria in s.36(2)(b) by being the spouse or dependant of a non-citizen who holds a protection visa (*cf V120/00A* at [60]; *SZLGF* at [83]).

82. If the Second Applicant does have a claim of her own for a protection visa, s.48A of the Migration Act would act as a bar to a further application, unless the Second Applicant were to make a successful application to the Minister under s.48B of the Act. That, however, is entirely a matter for the Minister (see *NAEA of 2002* at [16]).

83. The application will be dismissed with costs.

I certify that the preceding eighty-three (83) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: Virginia Lee

Date: 26 March 2008