

FEDERAL COURT OF AUSTRALIA

SZGHS v Minister for Immigration and Citizenship [2007] FCA 1572

**SZGHS, SZGHT, SZGHU, SZGHV AND SZGHW v MINISTER FOR
IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 544 OF 2007**

**ALLSOP J
15 OCTOBER 2007
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 544 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZGHS**
 First Appellant

SZGHT
 Second Appellant

SZGHU
 Third Appellant

SZGHV
 Fourth Appellant

SZGHW
 Fifth Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
 First Respondent

REFUGEE REVIEW TRIBUNAL
 Second Respondent

JUDGE: **ALLSOP J**

DATE OF ORDER: **15 OCTOBER 2007**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Magistrates Court made on 13 March 2007 be set aside and in lieu thereof it be ordered that:
 - (a) the decision of the second respondent made on 24 March 2005 and handed down on 19 April 2005 be set aside and the review by the second respondent of the decision of the delegate of the first respondent be remitted to the second respondent to be determined according to law; and
 - (b) the first respondent pay the costs of the applicants of the application before the Federal Magistrates Court.
3. The first respondent pay the costs of the appellants of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REFUGEE REVIEW TRIBUNAL
 Second Respondent

JUDGE: **ALLSOP J**

DATE: **15 OCTOBER 2007**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal from orders made by the Federal Magistrates Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the “Tribunal”) that affirmed a decision of a delegate of the first respondent not to grant a protection visa to the applicants.

2 The appeal is a difficult one. I differ from the Federal Magistrate not without hesitation. My disagreement with her Honour’s reasons rests not on the statement, or

perceived error in expression, of principle, but rather in my assessment of what the reasons of the Tribunal reveal in the context of the facts and the material put before it. In my view, the reasons of the Tribunal demonstrate a failure to assess the first appellant's claims to have a well-founded fear of persecution by reference to his claims, to the possibilities of future persecution, and to the reasonably foreseeable and not merely the immediate future.

3 The Tribunal may be taken to have directed itself in respect of these matters uncontroversially in its template introduction. That does not, however, immunise its reasons from scrutiny or from a conclusion that, notwithstanding assertions in its reasons, its approach demonstrates a failure to employ the correct approach (which it has otherwise correctly stated to bind it).

4 It is necessary to begin with the appellants' history. The Tribunal accepted the evidence of the first appellant and his wife. The appellants comprise a Fijian family, husband (first appellant), wife (second appellant) and three daughters who were born in 1987, 1989 and 1990. The first appellant (husband) is part European and part Fijian; his father was Welsh and his mother half Welsh and half Fijian. The second appellant (wife) is part Sri Lankan and part Samoan.

5 The events that have given rise to the fears of the first appellant have led him to fear for his own and his family's safety from the Taukei Movement and other extremists. The claims of the second to fifth appellants are dependent upon those of the first appellant.

6 The relevant history, taken largely from the first appellant's statement, was as follows. The first appellant served in the Fijian Army from 1978 to 1988. He suffered some racial slurs, but he had friends in the army and, as he said, "put up with whatever happened". In 1987, the year of the coup by Colonel Rabuka, the first appellant had what he described as a "difficult time". He had many Indian friends. He was horrified by their treatment. He feared similar treatment as a part Fijian.

7 From 1988 to 1999, he was a reserve in the Fijian Army. He worked as a courier, a chauffeur and at the post office.

8 From 1988 to 1998, there were "incidents" which made him concerned about his

family's future in Fiji, but he did not feel compelled to flee.

9 In December 1998, the first of three serious incidents occurred. He and his family were invited for tea to the home of Indian Fijian friends. While there, he lent assistance to an Indian Fijian neighbour who had called for help when Fijian youths from the neighbouring village made off with a cow. The first appellant reported the incident to police upon return to his friend's house after unsuccessfully pursuing the youths. The police did not come, saying they had no transport. After waiting with his friend for a while, the first appellant proceeded to drive his family home. The car soon came under stoning and he was forced to stop at a roadblock. There he was dragged from the car, abused and beaten to unconsciousness. I observed the first appellant at the appeal. He is not a small man. The first appellant described the events as follows:

A group of men rushed for me and pulled me out of the car and bashed me calling me names such as Indian lover and Kailoma, meaning half cast. My family was shocked and during this incident my wife screamed for help, when help finally arrived I was unconscious and taken to hospital where I was told that I suffered broken ribs and bruises to my whole body.

My car was badly damaged and my family was so scared to travel anywhere for some time. This incident was reported to the police but no action was taken. Police treated me in a funny way as if it was none of my business to help the Indians. They kept us waiting making excuses like 'wait the boss has to come he'll be here in [sic] soon'.

10 This first incident occurred in December 1998, at which time there was a pro-Fijian government in power.

11 In 1999, there were elections which led to the coming to power of the Indo-Fijian dominated Fiji Labour Party (the FLP). The first appellant says that he was drawn to the FLP in 1999, describing why this was so in his statement:

I was drawn to Fiji Labor party in 1999 because of the promise that it would work for the poor people. I was concerned that the disparity in income was big and the rich were getting richer because of the government policies. I thought a government supporting workers would give all of us a better future. I have had good Indian friends who were FLP supporters and they have been pressuring me over two to three years to give them my support. They thought that FLP needed a broad based support and did not want to be called the party of Indians.

12 The first appellant acted as a helper and supporter of the FLP in April and May 1999 and campaigned door-to-door in the Nausori area for an FLP candidate, a Mr Singh, who was a friend. This led to the second serious incident that occurred in April or May 1999, which was described by the first appellant in his statement as follows:

Upon returning from one of the houses I was confronted by about eight Native Fijian youths who asked me why I am campaigning in the area, I told them that I asked permission from one of the elders in the area and he has said it is not a problem.

One of the youths punched me in the face and shouted, "Let's kill him", and upon falling down they all got involved in kicking me and punching me. They were shouting "Fiji is for Fijians, Fiji is for Fijians". I fell unconscious and was taken away by an ambulance and later regained conscious [sic] in Hospital. I suffered multiple lacerations and bruises to the head and body areas. I later found out who the boys were and reported this to the Fijian Police. The Officer there called me a "Kyloma" and asked me why I should help "Kaindiya" who properly should all go back to India and that I should go back to colonial place that my forefathers came from and leave Fiji for True Fijians.

13 At the time of this incident elections were looming, but the government of the day was pro-Fijian.

14 The third event occurred after the election of the FLP government. Intruders broke into the family home at night, damaged property and fled. A neighbour heard the intruders say while fleeing that "*the 'Indian lover' should be taught a lesson*".

15 In mid-September 1999, the first appellant was approached to come to a monthly meeting of the Taukei Movement, which was described by the person who approached him as:

Some true patriots are having a meeting because they think Fiji is for Fijians.

The first appellant said that he would think about it. He consulted his wife who counselled him strongly to have nothing to do with the group. He then informed the person who approached him that he would not join them. One week later an event took place which the first appellant recounted as follows:

...on a Friday evening, my friend and I went to the Reserves Soldiers Club at Walu Bay when three thuggish persons walked in. They eyed us up and down

and then walked out. I asked my friend, "Glen do you know those guy's? [sic]". He replied "Yes they belong to group called the Taukei Movement", minutes later the same guys came back in and sat at the table next to us.

They started drinking heavily, after about twenty minutes they started getting rowdy and abusive, we got up to leave when they turned their abuse directly at us. One of them shouted, "People like you Kailoma (half cast) have no country of your own you are intruders".

We continued on our way out of the club, they followed us out still abusing us verbally once outside about five other men joined them, they proceeded to abuse us but we got into the vehicle and got out quickly before they lay their hands on us.

16 A few weeks later the first appellant was once again approached to join the Taukei Movement. He described these events and what ensued as follows:

A few weeks later, I was out to lunch, when a man approached me, he said "Bula bro! I want to talk to you about joining us, the Taukei movement". I said "why me", he said "we know you have been supporting the Indians". I was shocked because they knew I had been campaigning for the Labor party.

I was beginning to feel a real sense of fear, I said okay, let me grab some lunch first. We went to a house at Cunningham Road, there were about twenty men there, all looking solemn, when I sat down they gave me the third degree about my Fijian heritage, and that my loyalties lay with the Fijian people, when all this was over they would be the winning side, so it was in my best interest to join.

At this point, I was fearful, but tried to act normal, I said I would think about it, and get back to them, they reminded me that it was of the utmost importance that I give them a favorable [sic] answer.

Around early November 1999 I still had not gotten back to them, one evening my wife answered the phone, just by the look on her face I knew it was them, I got on the phone, there was a man at the other end, he said they are keen to see me come for the meeting and he said it in an angry way. I felt worried that they might harm my family. I have three daughters, so you can imagine my anxiety, I tried to buy time saying I would go up and see them.

I went to one meeting and tried to act sincere, they were in the process of planning a demonstration. I did not go after that. By this time I knew I had to get my family out of there, I applied for a visa to Australia and brought my family out.

17 The first appellant described his fear to go back:

I am afraid to go back because friends and relatives say that even though Speight is captured, apparently he is still maintaining the Taukei movement, and I am afraid they may actively recruiting people for the movement and might make life miserable for me. They hate native Fijians or half Fijians who support Indo-Fijians or Fijian Labor Party.

18 Thus, the claims of the appellants were based on events of some seriousness, one based on the first appellant actively campaigning for an Indo-Fijian politician and his evident support of the FLP and on the past targeting of him by an extremist movement to join their ranks on pain of threatened serious violence.

19 The appellants placed before the Tribunal reports of serious tension between the military (led by Commodore Bainimarama) and the government. (The Tribunal hearing was before the coup led by Commodore Bainimarama.) It was apparent from that material that one of the issues put forward by the appellant for consideration was the fact that the tension between the government and the military appeared to be based (at least in part) on the perceived leniency of the government towards those said to have been involved in the coup in 2000.

20 The approach of the Tribunal was as follows. In an important paragraph, the Tribunal discounted the significance of the three incidents, saying:

I accept that he was assaulted seriously on three occasions, and that these assaults were at least in part motivated by the applicant's perceived sympathy for Indo-Fijians, and his perceived political opinion. I consider that the assaults were unrelated to each other, and I am satisfied that they occurred in the specific circumstances of the time, that is, in the lead up to the 1999 elections. Even if I were satisfied that these events constituted past persecution of the applicant, I am not satisfied that there is a real chance that the applicant would be subjected to similar or more serious incidents in the future, amounting to persecution. In view of the changed circumstances – there are no elections looming, a pro-Fijian government is in power – there is no evidence to suggest that there is a real chance that serious and systematic violence amounting to persecution would resume, although the possibility of random, isolated racially based incidents occurring cannot be ruled out.

21 Whilst it is important to examine the whole of the Tribunal's reasons and recognising that fact finding is generally for the Tribunal, unless it reveals some vitiating legal error, some things need to be said about the paragraph. One of the three incidents, the serious beating consequent upon his campaigning for the FLP, could not rationally be explained by

the identified so-called “changed circumstances”. That there was no election looming is irrelevant and reflects a focus of attention on the near future. The existence of a pro-Fijian government in power was also irrelevant. This was the case when he suffered the first two beatings. One might have thought that a willingness to campaign (as a part Fijian) for the FLP against an incumbent pro-Fijian government may have been behind the beating. Also, the state of the existing government again reflects a focus of attention limited to the near future. These are very limited bases for concluding that persecution would not resume. The use by the Tribunal of the word “would” also reflects a possible attention to probability not possibility.

22 The Tribunal then dealt with the Taukei Movement, saying:

I accept that the applicant was approached by extreme nationalist indigenous Fijians shortly before his departure from Fiji at the end of 1999. In the light of subsequent events, namely the 2000 coup in which extreme nationalists and serving and former army personnel were involved, it seems possible that the group which sought to recruit the applicant was in some way connected with the coup planning, as the applicant suggested. It is also the case that many of those involved with the coup have now been released from prison, in some cases in circumstances suggesting a lack of will on the part of the present government to adequately punish them.

23 The Tribunal then stated the following:

The applicant’s parents and sister live in the same area as he did; he gave evidence that he maintains regular contact with them and with other friends and relatives in Fiji. Yet he is not aware of any specific recent or ongoing threats against him, and none have apparently been made against his family members there. Nor does he know anything of the situation of ex-Army friends who he said were also approached by Taukei prior to the coup and refused to join. I gave the applicant additional time after the hearing to provide evidence of a current and specific threat to him and he was not able to do so, submitting only newspaper articles which, while supporting his claims of ructions between the Fiji Armed Forces and the government, provide no information specific to his circumstances. In the absence of recent evidence that the applicant, or people like him are still of adverse interest to Taukei, I am not satisfied that any risk of harm to the applicant is more than remote, speculative or insubstantial.

24 There are a number of difficulties with this paragraph. First, it was not the first appellant’s case that he was likely to be threatened while he was in Australia. The giving of time for a current threat is hardly the point. The newspaper articles did not merely reveal

“ructions” between the army and the government; rather they revealed the continuing volatility of politics, racial considerations in politics and the possible continued influence of people who had been involved in the 2000 coup. Combined with the first appellant’s support (and likely future support) of the FLP, his racial background, and the serious and threatening approaches in the past of the Taukei Movement, these matters made difficult a conclusion of “changed circumstances”.

25 The Tribunal continued:

The applicant left Fiji six years ago. Assuming that he may have been at risk when he left at the hands of Fijian nationalists who sought his support in relation to their political activities, there is no external evidence before me to suggest that the current political situation would give rise to similar activity. It is remotely possible that the same men who previously approached the applicant may harbour ill feeling towards him, but in the absence of any evidence as to their current circumstances or of any recent or ongoing threat to the applicant I am not satisfied that they pose a real or substantial risk to the applicant. While there is evidence of some ongoing racial tension as a legacy of the coup. I am not satisfied that this would lead to serious or significant harm or harassment of the applicant, or any other mistreatment amounting to persecution for reason of his race or his political opinion. I have searched extensively through the Tribunal’s information resources in Fiji for information supporting his claim that he faces serious harm if he returns to Fiji. However, I have been unable to locate any external information which would indicate that the applicant’s fears are objectively well founded.

26 This paragraph purports to display a consideration of the appellants’ full circumstances. It does however concentrate upon the “current political situation”. It gives no regard to the fact that one of the incidents in 1999 (in which the first appellant was beaten and hospitalised) was consequent upon campaigning for the FLP, which is likely to re-occur.

27 Further the Tribunal once again drew conclusions based on probabilities, rather than examining the matter in the manner described in *Minister for Immigration and Multicultural Affairs v Rajalingham* (1999) 93 FCR 220 at 231-41.

28 Critically, however, looking at all of the reasons of the Tribunal, there was a failure to address the reasonably foreseeable future in the context of the claims made. The dealing with the three incidents was based on immediate facts – no elections looming and the character of the present government. This reflected a focus on immediacy which was no real assessment

of whether in the future, with elections looming, with the first appellant campaigning for the FLP, he would not face a similar beating for the same reasons, or threats from elements of the Taukei Movement who had already targeted him. The Tribunal's paragraph dealing with the three incidents was not just a body of introductory remarks; they were the encapsulated rejection of one body of the appellants' claims. The Tribunal failed, it seems to me, to deal with the fears of the first appellant based on the beating in April/May 1999 by reference to the reasonably foreseeable future and on the assumption that the first appellant will continue to support the FLP.

29 The treatment of the material put to the Tribunal by the first appellant as merely "supporting claims of ructions" between the army and the government was not merely an example of some evidence not being squarely addressed. Taken together with the second incident which occurred, with the first appellant's associations with the FLP and with the need to look to the foreseeable future, this material can be seen to underpin the fears of the first appellant that political circumstances in the reasonably foreseeable future may begin to approximate the racially charged atmosphere of 1999. It was during this time that he was beaten for campaigning for the FLP and threatened by the Taukei Movement in order to join them. The treatment of this material, in conjunction with the treatment of the three incidents persuades me that the Tribunal did not look at all the material from the perspective of the reasonably foreseeable future and did not address all the claims in that light, having regard to the material placed before it.

30 The Federal Magistrate was of the view that all the claims of the appellants were dealt with and that an adequately forward-looking analysis was undertaken for the purposes of assessing the nature of the first appellant's claims. For the reasons that I have given, I cannot agree.

31 These matters are sufficient to require that the matter be sent back to the Tribunal. The findings on state protection by the Tribunal were inadequate to prevent the error that I perceive as being relevantly operative or effective requiring the matter to be remitted. The Tribunal only considered whether the authorities would withhold protection for reasons that would fall within the Refugees Convention. In any event it was not argued that these findings insulated any error.

32

The orders of the Court will be:

1. The appeal be allowed.
2. The orders of the Federal Magistrates Court made on 13 March 2007 be set aside and in lieu thereof it be ordered that:
 - (c) the decision of the second respondent made on 24 March 2005 and handed down on 19 April 2005 be set aside and the review by the second respondent of the decision of the delegate of the first respondent be remitted to the second respondent to be determined according to law; and
 - (d) the first respondent pay the costs of the applicants of the application before the Federal Magistrates Court.
3. The first respondent pay the costs of the appellants of the appeal.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 15 October 2007

Solicitor for the Appellants: Silva Solicitors

Counsel for the Respondent: Mr G Johnson

Solicitor for the Respondent: DLA Phillips Fox

Date of Hearing: 8 August 2007

Date of Judgment: 15 October 2007