

FEDERAL COURT OF AUSTRALIA

MZYJN v Minister for Immigration and Citizenship [2011] FCA 548

Citation: MZYJN v Minister for Immigration and Citizenship [2011] FCA 548

Appeal from: MZYJN v Minister for Immigration and Citizenship & Anor [2011] FMCA 90

Parties: **MZYJN v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**

File number: VID 103 of 2011

Judge: **NORTH J**

Date of judgment: 12 May 2011

Date of hearing: 12 May 2011

Place: Melbourne

Division: GENERAL DIVISION

Category: No catchwords

Number of paragraphs: 24

Counsel for the Appellant: The appellant appeared in person

Counsel for the Respondents: Ms C Symons

Solicitor for the Respondents: Clayton Utz

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 103 of 2011

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: MZYJN
Appellant**

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

**REFUGEE REVIEW TRIBUNAL
Second Respondent**

JUDGE: NORTH J

DATE OF ORDER: 12 MAY 2011

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

- 1 The appeal is dismissed.
- 2 The appellant pay the first respondent's costs of the appeal.

THE COURT DIRECTS THAT:

- 3 Any reference to the name of the appellant in the transcript of proceedings be replaced with the words "the appellant".

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using Federal Law Search on the Court's website.

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 103 of 2011

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: MZYJN
Appellant**

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

**REFUGEE REVIEW TRIBUNAL
Second Respondent**

JUDGE: NORTH J

DATE: 12 MAY 2011

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 Before the Court is an appeal from a judgment of the Federal Magistrates Court delivered by Whelan FM on 31 January 2011. The federal magistrate dismissed an application by the appellant for a review of a decision of the Refugee Review Tribunal (the Tribunal) made on 26 July 2010. The Tribunal affirmed the decision of a delegate of the first respondent to refuse the appellant a protection visa.

THE CLAIMS

2 The appellant claimed to fear persecution as a citizen of India for the reason that he belongs to the Christian religion and to a scheduled caste. He claimed that he had been attacked by radical Hindus. In 2005, he said he joined the Catholic Yuva Dhara (CYD) and this caused Hindus, particularly members of Bajrang Dal (BD) and Vishwa Hindu Prashid (VHP) to turn against him. He recited a number of instances of harassment and physical violence.

3 In December 2006, the appellant said he was attacked by members BD and VHP on his way home from church. He said he was injured and admitted to a nursing home. He claimed he participated in a protest march in 2007 in New Delhi against violence against

Christians. He said that as a result of his involvement, he was targeted by members of BD and VHP in his home state of Punjab. Then he said that in April 2008, he arranged a function at which the president of the All Indian Christian Council was to speak. He said that before the function some members of BD and VHP came to his house and threatened him if he did not take steps to cancel the function.

4 Then, on 29 April 2008, he said he was again attacked on the way home from church by members of BD and VHP and was injured and hospitalised for seven days. He claimed he then left his home State at the request of his father and went to Delhi to stay with his uncle. He claimed that members of BD and VHP then searched for him at his home. He also claimed that the same people reported him to the police for converting others to Christianity and that the police were looking for him as a result. He came to Australia on 9 July 2008 to attend World Youth Day. He claimed that whilst in Australia his father reported that people were trying to find him.

THE DECISION OF THE TRIBUNAL

5 The Tribunal accepted that the appellant was involved with the church in Punjab and that he was an active member of the CYD. However, it found that the appellant was not a high profile member of the church. In relation to the alleged attacks on the appellant, the Tribunal found a number of inconsistencies in his evidence and did not accept that he was attacked and injured in December 2006. The Tribunal did not accept that he attended, planned, or was involved in the planning of the protest rally against violence against Christians.

6 Nor did the Tribunal accept that the appellant was injured by members of the BD and VHP in 2008. The appellant did not mention during the hearing before the Tribunal that he was involved with the planning of the meeting to be addressed by the President of the All Indian Council in April 2008. The Tribunal concluded from his failure to mention this fact that he was not so involved and consequently was not threatened by members of BD and VHP if he failed to cancel the meeting.

7 As a result of these findings, the Tribunal also did not accept that the police were searching for him regarding complaints about his activities converting Hindus to Christianity, or that people were searching for him at home and approaching his family.

8 The examination by the Tribunal was unusually fulsome and balanced. The Tribunal comprehensively examined the country information concerning the potential threat of persecution to Christians in India. Weighing the country information against the evidence which it accepted of the activities of the appellant, the Tribunal concluded that the appellant did not face a real risk of persecution in the future because his role in the church was not at such a level that he would attract the attention which had in the past resulted in the persecution of Christians in India. The Tribunal was careful to point out that it was possible, having regard to the country information, that the appellant might encounter some localised violence as a result of his religion. However, the Tribunal determined that it was unlikely this would amount to serious harm as required for the establishment of refugee status.

9 The Tribunal also examined the question whether the appellant would be likely to suffer persecution in the future as a result of his low caste background. It rejected this claim because no evidence of past harm on this basis had been provided and the appellant's extensive education and regular employment indicated that he would be an unlikely subject of the discrimination levelled against low caste persons.

THE DECISION OF THE FEDERAL MAGISTRATE

10 The appellant applied for review of the decision of the Tribunal to the Federal Magistrates Court. Three grounds were relied upon as follows:

1. That the tribunal's decision was in breach of section 424A(1) of the Migration Act 1958 (Cth).

Particulars: (a) There was certain adverse information used by the Tribunal to affirm the decision under review.

(b) The Tribunal did not disclose the information in accordance with s 424A(1).

2. That the tribunal made error of law and lack procedural fairness and therefore committed jurisdictional error.

3. That the Tribunal made denial of natural justice. Because it failed to provide further opportunity before the tribunal.

11 In relation to the first ground, the federal magistrate observed that the information upon which the Tribunal relied was information provided by the appellant in his visa application, information provided by him in his application for review, and extensive country information. The federal magistrate then said:

None of this type of information is covered by s.424A(1) because of the provisions of s.424A(3)(a), (b), and (ab). The only other information relied upon by the Tribunal arose from the information provided by the Applicant himself and this consisted of the discrepancies and inconsistencies it found in that information. As Ms Symons [counsel for the first respondent] submitted, s.424A relates to evidentiary material and not to the existence of doubts or inconsistencies identified by the Tribunal [*SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609]. I am satisfied that in this case, the information referred to by the Applicant does not fall within the ambit of s.424A(1). I am therefore satisfied that ground 1 of the application is not made out.

12 The federal magistrate then rejected the second and third grounds, essentially on the basis that the appellant had failed to identify any error of law or lack of procedural fairness in the decision of the Tribunal.

THE NOTICE OF APPEAL

13 By a notice of appeal dated 16 February 2011, the appellant appealed against the orders made by the federal magistrate. He relied on one ground, which was the same as the first ground relied on before the federal magistrate.

14 The appellant appeared without legal representation at the hearing before this Court but had the assistance of an interpreter into Punjabi. When asked to explain the ground of appeal the appellant outlined two bases for his complaint. First, he said that there was a danger to his life in India. He said that if he goes back they will be looking for him and will punish him. He said he was safe in Australia but not safe in India.

15 The second basis of the appellant's complaint was that he had provided all the evidence of the attacks against him and that the Tribunal had failed to consider that evidence. He also said that he had submitted a police report regarding an attack on his parent's house for the consideration of the Tribunal and that the Tribunal had failed to consider that report.

CONSIDERATION

16 The first basis of the appellant's complaint appears to be that the Tribunal wrongly rejected his version of the facts. Despite the Court having explained its role on judicial review, the appellant nonetheless was concerned to inform the Court that the factual approach of the Tribunal was wrong. This is not a complaint which the Court can address in judicial review proceedings. The fact finding function is a function for the Tribunal and the

complaint made by the appellant did not demonstrate any jurisdictional error which would permit this Court to intervene.

17 Regarding the second basis of the appellant's complaint, the reasons of the Tribunal demonstrate that it gave consideration to the evidence concerning the allegations by the appellant that he had been attacked and injured. There is no basis for the complaint of a failure to consider that material.

18 In relation to the police report, the following extract from the reasons of the Tribunal shows that it took the report into consideration:

The Tribunal further does not accept the applicant's claim that since he has been in Australia, members of Bajrang Dal attacked his house and continue to follow his family. In support of his evidence, the applicant provided a copy of a translation of a police report dated 21 August 2009 alleging that "unknown persons" came to the applicant's family's house and broke household items and said that they would find the applicant anywhere in India and "eliminate him". As outlined above, the Tribunal does not accept as credible the applicant's evidence that he was attacked by members of Bajrang Dal and Vishwa Hindu Prashid in April 2008 and escaped to New Delhi and therefore it does not accept that his parents continue to be visited and threatened by members of Bajrang Dal. Accordingly, the Tribunal gives little weight to the police report which refers to an attack on the applicant's parents' house.

19 The police report was provided by the appellant on 10 December 2009 following the hearing before the Tribunal on 11 November 2009. The police report is not an original document but is rather a translation from Punjabi into English. The translation is apparently attested by a notary, who is an advocate in India. The translation states that the appellant's father made a statement to the police station in Sansarpur, his hometown, that six or seven "unknown persons" came to his home, vandalised the house and threatened to kill the appellant if they found him in India. At the end of the report is a response by the police indicating that they are seeking to take action against the intruders.

20 In an otherwise comprehensive and careful decision, the manner in which the police report is dealt with by the Tribunal is somewhat confusing. The Tribunal concludes that it does not accept the appellant's evidence of the attack in April 2008 and the appellant's escape to New Delhi. The Tribunal then rejects the claim that the appellant's parents continued to be visited and threatened by members of BD and VHP. The Tribunal then concludes that accordingly it "gives little weight to the police report which refers to an attack on the applicant's parent's house".

21 It is not altogether easy to see how the Tribunal, by this sentence, intended to deal with the police report. The significance of the report from the appellant's point of view was the alleged threat made by the intruders to eliminate him. If the police report were genuine, then it would support the case made by the appellant. It is difficult to understand the Tribunal's expression of the process of reasoning which gives some, but reduced, weight to the report and yet rejects the point to which the report is directed, namely the threat to the appellant.

22 The Court raised with Ms Symons, who appeared on behalf of the first respondent, whether the manner in which the Tribunal dealt with the police report indicated error on the part of the Tribunal. Ms Symons contended that the Court should not scrutinize the relevant sentence with an eye to detecting error. She submitted it is likely that the Tribunal intended to conclude that it would not accept the police report as outweighing the effect of the evidence given by the appellant about the alleged attacks and visitations to his parents. In other words, the Tribunal intended that in balancing and assessing all of the evidence, the police report was not sufficient to overcome the impression gained by the Tribunal from the appellant's evidence.

23 That would be unexceptionable reasoning and is the approach which it seems the Tribunal intended by the relevant sentence. Had the Tribunal meant to convey that the police report was to be entirely rejected because the evidence of the appellant had 'poisoned the well', a very different formulation would have been adopted. No doubt the sentence could have been more clearly expressed to demonstrate that the Tribunal was engaged in a balancing exercise, but in the end I am satisfied this is what it undertook. Consequently, in relation to the police report no legal error is shown.

24 It follows from these reasons that the appeal must be dismissed.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North.

Associate:

Dated: 24 May 2011