FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZMYT v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 1718*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visas – show cause application made five years after the Tribunal decision – Tribunal's notification letter returned to sender – applicant later obtaining a copy of the decision under the *Freedom of Information Act* – whether show cause application competent.

Federal Magistrates Court Rules 2001 (Cth)
Freedom of Information Act 1982 (Cth)
Migration Act 1958 (Cth), ss.430, 476, 477
Migration Legislation Amendment Act (No 1) 1998 No 113, 1998

Minister for Immigration v SZKKC (2007) 159 FCR 565
SZKNX v Minister for Immigration [2008] FCAFC 176

Applicant:	SZMYT
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3079 of 2008
Judgment of:	Driver FM
Hearing date:	22 December 2008
Delivered at:	Sydney
Delivered on:	22 December 2008

REPRESENTATION

Counsel for the Applicant: Dr J Azzi, *pro bono publico*

Solicitors for the Respondents: Mr A Markus
Australian Government Solicitor

INTERLOCUTORY ORDERS

(1) The application is dismissed as incompetent.

(2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application in the sum of $2,500 in accordance with rule 44.15(1) and item 1(b) of part 2 of schedule 1 to the *Federal Magistrates Court Rules 2001* (Cth).

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3079 of 2008

SZMYT
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT
(revised from transcript)

1. I have before me a show cause application filed on 25 November 2008 seeking review of a decision of the Refugee Review Tribunal ("the Tribunal"). The application was accompanied by a short affidavit apparently signed by the applicant which identified the Tribunal decision and, at the time it was received by the court registry, had enclosed with it a copy of the Tribunal decision handed down on 22 October 2003. The Tribunal decision was to affirm a decision of the delegate not to grant the applicant a protection visa.

2. It was apparent to the applicant, or those assisting him at the time the show cause application was filed, that he might need an extension of time for the filing of the application. That is because a further application for an extension of time to file and serve the show cause application was made at the time the show cause application was filed. That application incorrectly refers to order 52, sub rule 15 of the *Federal Court Rules*. That is not presently material. It is plain that the

applicant seeks an extension of time from this Court under its Rules for this show cause application.

3. The question which became apparent to me when the matter came before me on 9 December 2008 is whether the Court has any jurisdiction to entertain the show cause application. That is because of the operation of s.477 of the *Migration Act 1958* (Cth):

> *(1) An application to the Federal Magistrates Court for a remedy to be granted in exercise of the court's original jurisdiction under section 476 in relation to a migration decision must be made to the court within 28 days of the actual (as opposed to deemed) notification of the decision.*
>
> *(2) The Federal Magistrates Court may, by order, extend that 28 day period by up to 56 days if:*
>
> > *(a) an application for that order is made within 84 days of the actual (as opposed to deemed) notification of the decision; and*
> >
> > *(b) the Federal Magistrates Court is satisfied that it is in the interests of the administration of justice to do so.*
>
> *(3) Except as provided by subsection (2), the Federal Magistrates Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 28 day period.*
>
> *(4) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.*

4. I directed that the matter be listed for hearing today on the question of the Court's jurisdiction. For the purposes of today's hearing, the applicant relied upon an affidavit filed in court by leave today. That affidavit is largely directed at issues other than the issue of the Court's jurisdiction but paragraph 35 of the affidavit is, in part, relevant. In that paragraph the applicant states in part:

> *I did not know of the RRT Hearing and Decision until such things were explained to me by volunteers from Balmain For Refugees after they had obtained files under FOI legislation in late 2007. The decision of the Member at my RRT Hearing (29 September 2003) was to reject my case.*

5. The applicant was cross-examined on his affidavit. His evidence was at times inconsistent and not wholly reliable. The applicant asserted emphatically that he was never personally given a copy of the Tribunal decision. However, it must have passed through his hands at some stage because copies of the decision were enclosed with his application for an extension of time and his affidavit accompanying his show cause application. The question is whether the applicant came into possession of the Tribunal decision within 84 days of his application to the Court.

6. The Minister relies upon the affidavit of Benjamin James May made on 8 December 2008. I incorporate the text of paragraphs 1 to 8 of that affidavit in this judgment:

> *I am a solicitor employed in the Sydney office of the Australian Government Solicitor ("the AGS") and, subject to the direction of the Chief Executive Officer of the AGS, have the conduct of this matter on behalf of the first respondent.*
>
> *I make this affidavit from my own knowledge and from my inspection of file N0345608 of the second respondent, the Refugee Review Tribunal (RRT), relating to the applicant.*
>
> *On 16 January 2003, the RRT received an application for review of a decision of a delegate of the first respondent completed in the name of the applicant. …*
>
> *On 7 September 2003, the RRT received a letter from Nelson Shi of Southern Hemisphere Consulting Pty Ltd enclosing a change of address details form completed in the name of the applicant. …*
>
> *On 22 October 2003, the RRT wrote to the applicant at the address specified in the change of address details form. The RRT's letter enclosed a copy of its decision and its reasons for decision. The RRT's letter was returned marked "unclaimed" on 15 December 2003. …*
>
> *On 5 September 2007, a request for access to documents under the Freedom of Information Act 1982 (Cth) was completed in the applicant's name. …*
>
> *On 11 September 2007, an officer of the second respondent wrote to the applicant in relation to his request for access to documents, and released folios 1-51 of RRT file N0345608 to the applicant. …*

> *On 12 September 2007, an authorisation to act was completed in the applicant's name, authorising Frances Milne to obtain documentation relating to the applicant. On 16 September 2007, Ms Milne wrote an email to an officer of the second respondent requesting a copy of the RRT's decision. …*

7. The applicant was taken to the Freedom of Information request reproduced at folio 29 of the annexures to the affidavit. He acknowledged the signature on the document as his and stated that he had been assisted by others in the making of that request. That request was dated 5 September 2007. I infer that that Freedom of Information request was made by or on behalf of the applicant at that time. Page 32 of the annexures to Mr May's affidavit is a letter dated 11 September 2007 to the applicant at the Villawood Detention Centre. A sticker on the letter indicates that the letter was sent by registered post. That letter states that the response to the FOI request was that folios 1 to 51 on the Tribunal file were relevant to the request and were being provided. I infer from the contents of that letter that the contents of the Tribunal file relating to the applicant were copied and a copy was provided with the letter dated 11 September 2007. I also infer from the numbering on the top right hand corner of the copy of the Tribunal decision annexed to Mr May's affidavit that a copy of the Tribunal decision was included from the Tribunal file.

8. The applicant was asked in cross-examination whether he received the Tribunal's letter releasing the Tribunal decision and other documents under the *Freedom of Information Act 1982* (Cth). He initially said that he could not recall and it was plain he does not read English. However, he did ultimately concede that the Tribunal's letter was delivered to him at the Villawood Detention Centre and came into his hands when an officer at the Centre asked him to collect some mail. He also agreed with a suggestion from the solicitor for the Minister that he gave the documents so delivered to the persons at Balmain for Refugees support centre, who subsequently assisted him. The only evidence of any other means by which Balmain for Refugees may have obtained a copy of the Tribunal decision is Ms Milne’s email on 16 September 2007 but there is no evidence of a further copy of the Tribunal decision being provided. I find on the balance of probabilities that a copy of the Tribunal decision was received personally by the applicant sometime in September 2007 and was subsequently provided to the Balmain for

Refugees group and that the decision was explained to the applicant in late 2007.

9. The question then is whether that form of notification is sufficient for the purposes of s.477. On the basis of the decision of the Full Federal Court in *Minister for Immigration v SZKKC* (2007) 159 FCR 565 it would not be sufficient because the Full Court stated in that case that personal service was the only means of notification that would suffice. However, in *SZKNX v Minister for Immigration* [2008] FCAFC 176 it is apparent that the Full Court regarded as *obiter dicta* the statements of the Federal Court in *SZKKC* relating to means of delivery sufficient for the purposes of s.477 or for the Act generally because the Court was, in that case, dealing with a case of non-receipt of the decision. In *SZKNX* at [25] the Full Court stated:

> *Irrespective of how the Tribunal has complied with its obligation under s 430(2), if an applicant has physically received a copy of the Tribunal's decision and reasons, as has happened in the present case, there has been actual notification of the decision for the purposes of s 477. Accordingly, the appellant received actual notification of the Tribunal's decision of 26 February 1999 prior to 17 March 1999. It follows that the Federal Magistrates Court did not err in concluding that it did not have jurisdiction to entertain the appellant's application for Constitutional writ relief in relation to the Tribunal's decision of 26 February 1999. The appeal should be dismissed with costs.*

10. Up to June 1999 s.430 provided:

> *Refugee Review Tribunal to record its decisions etc. and to notify parties*
>
> *(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:*
>
> > *(a) sets out the decision of the Tribunal on the review; and*
> >
> > *(b) sets out the reasons for the decision; and*
> >
> > *(c) sets out the findings on any material questions of fact; and*
> >
> > *(d) refers to the evidence or any other material on which the findings of fact were based.*

> (2) *The Tribunal must give the applicant and the Secretary a copy of the statement prepared under subsection (1) within 14 days after the decision concerned is made.*
>
> (3) *Where the Tribunal has prepared the written statement, the Tribunal must:*
>
> > (a) *return to the Secretary any document that the Secretary has provided in relation to the review; and*
> >
> > (b) *give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based.*

11. By the time of this Tribunal decision s.430(2) had been repealed[1]. Accordingly, there were no relevant obligations of the Tribunal under s.430(2) (as it then stood). In addition to that section s.430A of the Migration Act requires notification by prescribed means within 14 days after the decision has been made. Section 430(2) has been substantially amended this year and the current terms of that subsection are no longer relevant.

12. In the present case, I accept from Mr May's affidavit at paragraph 5 that the Tribunal attempted to comply with its notification obligations under the Migration Act although its attempt was unsuccessful in as much as the letter was returned to sender. However, the attempt was sufficient to meet the Tribunal's statutory duty pursuant to s.430A. In any event, to my mind the important point to draw from the Full Federal Court's statements in *SZKNX* at [25] is not so much how notification was effected but rather, whether physical delivery by some means or other has been achieved. Section 477 speaks of actual notification. It is clear that actual notification does not occur until an applicant receives a copy of the Tribunal decision himself or herself. It appears now also clear that the manner of delivery is not significant, provided that it occurs. Further, I do not understand the operation of s.477 to be dependent upon successful delivery of the Tribunal's decision record within 14 days of the Tribunal decision. Rather, it depends upon actual physical notification, whenever that occurs.

---

[1] *Migration Legislation Amendment Act (No 1) 1998* No 113, 1998

13. This applicant was, as I have found, actually notified of the Tribunal decision prior to the end of 2007 when he physically received a copy of the Tribunal decision in response to the Freedom of Information request made to the Department and passed on to the Tribunal. His application to this Court was not made until 25 November 2008, around 11 months, at least, later. That is obviously well outside the maximum period of 84 days within which the Court may entertain an application pursuant to s.477. A consequence of the application being made outside that period is that the application must be dismissed as incompetent. I so order.

14. Costs should follow the event in this case. The Minister seeks costs fixed in the sum of $2,500. The applicant did not seek to be heard on costs. I will order that the applicant is to pay the first respondent's costs and disbursements of and incidental to the application in the sum of $2,500 in accordance with rule 44.15(1) and item 1(b) of part 2 of schedule 1 to the *Federal Magistrates Court Rules 2001* (Cth).

I certify that the preceding fourteen (14) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 23 December 2008