FEDERAL COURT OF AUSTRALIA

SZLWE v Minister for Immigration and Citizenship [2008] FCA 1343

SZLWE v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 979 OF 2008

PERRAM J
19 SEPTEMBER 2008
SYDNEY

NO CATCHWORDS

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 979 OF 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZLWE** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**PERRAM J**
DATE OF ORDER:	**19 SEPTEMBER 2008**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The Appellant pay the costs of the First Respondent.

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

NO CATCHWORDS

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NEW SOUTH WALES DISTRICT REGISTRY **NSD 979 OF 2008**

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BETWEEN:	**SZLWE** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent** **REFUGEE REVIEW TRIBUNAL** **Second Respondent**
JUDGE:	**PERRAM J**
DATE:	**19 SEPTEMBER 2008**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal from the Federal Magistrates Court. That court dismissed the Appellant's claim for writs of certiorari and mandamus directed to the Second Respondent. To understand the issues which arise in the appeal it is necessary to say a few words about the Appellant's circumstances.

2 The Appellant arrived from Lebanon in Australia on 9 March 2007. On 1 June 2007, he applied for a protection visa which is the kind of visa applied for where a person seeks asylum on the basis that he or she is a refugee. By s 36 of the *Migration Act 1958* (Cth) ("the Act"), a protection visa could be granted by the Minister to the Appellant if the Minister were satisfied that the Appellant was a non-citizen to whom "Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol". The Refugees Convention is defined in s 5 of the Act to mean the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951. Article 1A(2) of that Convention defines a refugee as a person who:

> … owing to a well-founded fear of being persecuted for reasons of race, religion,

> nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

3 Although the question for the Minister was whether Australia had protection obligations to the Appellant, the question of whether he could be satisfied that the Appellant was a refugee within this definition was an important part of the decision making process.

4 The Minister was not required to resolve the Appellant's application personally. By s 496 the Minister could delegate any of his functions under the Act which, naturally enough, included those under s 36. The Appellant's application was processed by such a delegate who, on 27 August 2007, declined to grant a protection visa. The Appellant was not left without a remedy. Part 7 of the Act provides a regime by which such decisions may be reviewed. Section 457 establishes the Refugee Review Tribunal ("the Tribunal") and ss 411 and 414 imposed upon the Tribunal, in this case, the duty to review the decision made by the delegate. On 17 September 2007, the Appellant availed himself of this regime and applied to the Tribunal for a review of that decision. Pursuant to s 418, the Secretary to the Department conveyed to the Tribunal the delegate's reasons for the decision together with its file.

5 Based on those materials, the Tribunal was not satisfied that it could accede to the Appellant's application for a review. Accordingly, it was obliged by s 425 to invite the Appellant to appear before it to give evidence and present arguments about the issues relating to the review. A hearing for that purpose took place on 6 December 2007. On 20 December 2007, the Tribunal delivered its decision by which it affirmed the delegate's decision not to grant the protection visa.

6 It is useful to note at the outset three aspects of the Tribunal's decision. First, it misdescribed the Appellant as having been a member of the Lebanese armed forces when, in fact, he had been a member of a militia known as the Lebanese Forces. Secondly, it found that the Appellant did not fear persecution on the basis of a political opinion. Thirdly, after delivering its reasons for affirming the delegate's decision it sent them to a barrister and migration agent, John Eyeson-Annan, at a time when it knew that Mr Eyeson-Annan had been suspended as a registered migration agent.

7 The Appellant then sought the issue of writs of certiorari and mandamus from the Federal Magistrates Court. Its jurisdiction to grant these writs was circumscribed by the provisions of s 476 of the Act and the High Court's decision in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. The combined effect of those matters is that review in the Federal Magistrates Court is only available where jurisdictional error is established.

Political opinion

8 Of the three matters previously mentioned, it was only the question of political opinion which was ventilated before the learned Federal Magistrate. The Appellant pointed to a passage in the transcript of his hearing before the Tribunal on 6 December 2007 which was as follows:

> THE INTERPRETER: No, they asked me for the main office like in Beirut for the main you know like security office in Beirut to go there and attend so that was on the 22nd when I went, yeah. Yeah, 8.30 I went to the investigation. Yeah, fine. Yeah, I went inside, I waited until my turn came and they took me inside to the investigation, you know, department. They start asking me questions, 'where do you work, what time you work and how long you've been working. I told them I've been working in this kind of work for five years; I work for 12 hours every day. They said to me, okay, they said we have information about you that in 2004 I used to work security for the Americans in Iran, that's why they stopped the procedures of my passport. I said I've been like I've been working for five years in my work, that's what I'm saying to you like for such a long time I've been working and this is my passport. You gave it to me from your office from 2001 for 2002 so how could - I could I …. then? Okay, they said that they are really sure about this information, they've got evidence about this information that I've been to Iran, they've got information about it and they said okay, I told them, all right, show me this information and show me my photo that I was working there so I can believe it. I stayed in the investigation room for about two hours, too hours and a half until 10.30, 11. I was giving them all the evidence that I'm a person that never left, like I didn't leave Lebanon, not even one day, one night. I was showing them places that I was working, I didn't go anywhere, I didn't leave, I didn't leave Lebanon at all. For no reason they caused me trouble, at that stage they didn't give me my passport. They said we'll let you know regarding your passport but after one week from this date someone in my work saying to me after one week they said, someone in my work said to me there's someone from the police office, like there's somebody from the security office, they're asking for you, from the …. office. Yeah, then I spoke to the person in charge of the station and they say like this is a person like and like he hasn't been anywhere; I never went outside and he's been working all this time so why they stopped his passport. Yeah, after like when he's talking to my office that I've been working there and didn't leave at all like after 52 days on the 22nd of the 1st they gave me the passport, on the 23rd of the 1st, like there's been like a protest in Lebanon on the like all the guys they were doing like a protest in Lebanon, you know that was with the former governor, like …. like all this.

9 The Tribunal then asked a number of questions, including the following question:

> MR DELOFSKI: So what do you think will happen to you if you return to Lebanon?
>
> THE INTERPRETER: Like if they invented you know the story of like I was a security officer in Iraq for the Americans, I mean I don't know what they might frame to me when I return and you see like the situation in Lebanon now is really bad. They are not able, you know, to arrest anybody who is doing all this trouble. It's a country without a governor, without anything.

10 In my opinion, allowing for the obvious language difficulties, the following matters may be extracted from that exchange:

(a) the Appellant had applied for a passport;

(b) he went to the security office at Beirut on 22 December 2006;

(c) he was taken into an interview as part of an investigation;

(d) he was asked where he worked and how long he had worked there;

(e) he was told that they – that is, those conducting the investigation – had information that the Appellant had worked in 2004 in security in Iran for the Americans;

(f) it was that work for the Americans in Iran which had caused his passport application to be delayed;

(g) the Appellant denied that this was true – that is, he denied categorically that he had worked for the Americans in Iran;

(h) his investigators said they were "really sure about this information" and that they had "evidence about this information that [you've] been to Iran";

(i) the interview continued for another 2.5 hours until 10.30 (whether in the morning or the evening is unclear);

(j) during that interview he sought to persuade them that he had not left Lebanon during the period it was alleged he was in Iran working for the Americans;

(k) he did not receive his passport at that time;

(l) he subsequently did receive his passport; and

(m) he was concerned that if the officials had been willing to make up the story that he was a security officer in Iraq (*not* Iran) then, when he returned home, he might be harassed by the making of further untrue allegations.

11 The Appellant had previously made a similar claim in his original application to the delegate. In that document – which was signed by the Appellant on 17 May 2007 – he had said:

> I have experienced the abuse from civilians and authorities, I have also been harrased by workers when I went to apply for my passport. In Lebanon (Beirut) they accused me for something I did'nt do, I applied for my passport on the 7th 12 06 and instead of it taking 3 days to be approved, they gave it to me on the 22nd of Jan 07, after they harassed me accusing me of being in another country working and mistreating me, interigating me, and they were all false alligations made about me, but they only did it to harrass me. they will do anything to try and pin things on to you. Just to harass you.

12 It will be seen that the Appellant characterised the allegation against him that he had worked in Iran for the Americans as an example of the abuse that he was likely to receive if he returned. In particular, he was concerned that some other, equally untrue, allegation might be made against him.

13 The Tribunal dealt with this matter directly:

> The applicant said that he applied for a passport in late 2006 and had been told to pick it up in 5 days. When he returned in 5 days to pick up the passport he was told that it was not ready. A week later he was told to attend an office for further questioning about his application. He attended the interview and was asked a lot of questions including whether he had worked for the Americans, to which he responded that he had not. After some further delays, he was eventually issued with a passport on 22 January 2006.
>
> The applicant recounted another incident when he was unwittingly caught up in a violent incident in Beirut involving protesters and the Lebanese armed forces. Some people had been shot.
>
> The applicant said that if he returns to Lebanon he fears he might be "framed". He said that there was no effective government or adequate protection in Lebanon.
>
> …
>
> In describing his experiences to the Tribunal and in his written statement of claims, the applicant did not allude to any Convention nexus, even when the Tribunal asked the applicant directly whether his fear of harm could be attributed to any of the 5 Convention reasons. Rather, the applicant saw himself as an unwitting victim or innocent bystander caught up in a difficult and violent environment arising from the outbreak of civil war in Lebanon as well as conflicts and skirmishes between different rival groups.
>
> Based on the evidence, the Tribunal is not satisfied that the applicant was persecuted in the past for reasons of his political opinion, imputed or otherwise, religion, membership of a particular social group or any other Convention reason. Nor does the Tribunal accept that there exists a real chance that he will face persecution for a Convention reason on his return to Lebanon.

14 Before the learned federal magistrate, the Appellant argued that the Tribunal failed to consider a claim of imputed political opinion which, it was said, arose clearly on the material before the Tribunal even though it was not directly raised by the Appellant. If such a claim had arisen clearly on the materials before the Tribunal and if the Tribunal had failed to deal with that claim then it may be that the Tribunal would have failed to have carried out the function of reviewing the delegate's decision: see *NABE v Minister for Immigration* (2004) 144 FCR 1 at 19-20 [61] per Black CJ, French and Selway JJ. Such a failure would constitute a jurisdictional error: *NABE* (2004) 144 FCR 1.

15 For such an error to arise, however, it would be necessary that a case based upon imputed political opinion arose clearly on the material before the Tribunal. I do not think that it did. The material which was before the Tribunal showed that the Appellant was concerned that if he returned to Lebanon he might be framed in respect of matters of which he was completely innocent. His fear that such framing might occur was based on his previous experience of having had false allegations made against him at the passport office. In that context, it is apparent that it is the making of the false allegations which now forms part of the persecutory conduct relied upon. Once that is appreciated, it becomes plain that in order to make good the claim there needed to be some suggestion that that persecutory conduct was being inflicted for a Convention reason. But there was no such material before the Tribunal. The Appellant did not suggest that the false allegations were being made against him because he held a particular political opinion.

16 It is, of course, conceptually confusing that the persecutory conduct relied upon consisted of false allegations about the Appellant to the effect that he had worked for the Americans in Iran. It may be accepted that the allegation that the Appellant had worked for the Americans in Iran was capable of giving rise to an imputation that the Appellant was an American sympathiser. That he was not an American sympathiser (as appears to be the case) did not matter for it is established that the political opinion in question need not actually be held – it suffices that those who are alleged to persecute believe that the person in question holds the opinion: *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 416 per Gaudron J, 433 per McHugh J; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and

Gummow JJ; see also *Canada (Attorney-General) v Ward* [1993] 2 SCR 689 at 746 per La Forest J (delivering the judgment of the court).

17 However, the material before the Tribunal did not suggest that it was the holding of this opinion which was the reason that the Appellant was being persecuted. His evidence instead was to the effect that the making of such false allegations had become usual in Lebanon and was something to which everyone was exposed. Thus, in truth, the case was not one in which it was imputed to him that he was an American sympathiser and was, therefore, persecuted for being such a sympathiser. Rather, it was one in which people in general in Lebanon were exposed to the risk that false and baseless allegations might be made against them. Put another way, the Appellant's account of events in Lebanon indicated a strange state of affairs in which ordinary citizens going about their business might be exposed to the making of baseless allegations. Once that is appreciated, it can be seen that there could be no claim based on imputed political opinion: persecution for *no* reason cannot be persecution for *one* of the reasons set out in Article 1A(2) of the Convention.

18 It follows that I do not think that the material before the Tribunal clearly presented a case based on imputed political opinion. Accordingly, the Tribunal did not fail to conduct the review required by s 414 by not considering such a case. It committed no jurisdictional error.

Confusion of membership of Lebanese forces with membership of Lebanese Armed Forces

19 It is then useful to say something about the Tribunal's confusion of the Appellant's membership of the Lebanese forces with membership of the Lebanese Armed Forces. In the Appellant's amended application to the Federal Magistrates Court such a claim was expressly included. However, at the hearing in the Federal Magistrates Court the Appellant, who was represented by counsel, abandoned that argument. There may be some circumstances in which an appellate court will permit a party who has expressly abandoned a point at trial to raise it afresh on appeal. Gyles J would have permitted such a course in *Dovuro v Wilkins* (2000) 105 FCR 476 at 527 [181] at least where the point involved no prejudice to the other party. Branson and Finkelstein JJ took the opposite view: 487-488 [38] and 508-509 [119]-[120]. There may be something to be said for the view that where a point is expressly

abandoned that the doctrine of waiver is relevant to the question: cf. *Browne v Dunn* (1894) 6 R 67 at 75 per Lord Halsbury, 80 per Lord Bowen; applied by the Privy Council in *Yorkshire Insurance Co v Craine* [1922] 2 AC 541 at 552-553 per Lords Buckmaster, Atkinson, Sumner, Parmoor and Wrenbury. If that were so, the question of whether an appellate court should entertain a fresh ground might not be relevant – there might be no ground to raise. However, whether the question is posed as one about the circumstances in which an appellate court should permit a point abandoned below to be resurrected on appeal, or, instead, one of waiver leading to the conclusion that the point no longer juridically exists – the outcome is the same in this case. I would not permit the abandoned ground to be entertained.

20 However, for completeness, even if it had been permitted to be raised, it would not have altered the outcome of the appeal. It is possible that when the Tribunal makes an error of fact that it may, in some circumstances, fail to deal with a claim raised before it and hence fail to comply with its obligation to review: *NABE* (2004) 144 FCR 1 at 20 [63]. In this case, however, the Appellant's claim that he had been a member of the militia was not connected to any of his fears if he should return to Lebanon.

Sending of notice of decision and decision to suspend migration agent

21 On 12 December 2007, the Tribunal sent a letter notifying its intention to hand down its decision to Mr Eyeson-Annan who had been the Appellant's migration agent. Mr Eyeson-Annan had, by then, been suspended from practice as a migration agent, a fact of which the Tribunal had informed the Appellant at its hearing on 6 December 2007. On 20 December 2007, the Tribunal sent a letter enclosing its reasons for decision to Mr Eyeson-Annan. The Appellant contends that the sending of those two important letters to a person who had been suspended as a migration agent vitiates the decision of the Tribunal.

22 Section 430A(3) required the Tribunal to notify the parties of its intention to hand down its decision. Section 430A(4)(b) required that notice to be given in one of the ways specified in s 441A. However, s 441G(1) required the Tribunal to send the notice to an "authorised recipient" if such had been appointed in writing. If such an authorised recipient had been appointed, the Tribunal was taken to have given the notice to the Appellant if it had provided it to the authorised recipient.

23 In this case, the Appellant initially appointed Mr Eyeson-Annan as his migration agent on 17 May 2007. On the form appointing Mr Eyeson-Annan as his migration agent there was a section headed "Part E – Authorisation for migration agent to act on your behalf". Underneath that there then appeared the words:

> My migration agent is authorised to act on my behalf and receive written communication (as permitted by law) in relation to: … all matters.

24 Next to the words "all matters" there appeared a box which was ticked. On another part of the form entitled "Part G" Mr Eyeson-Annan (who also signed the form) agreed "[a]s the migration agent named on this form" to receive communications from the department. It is important to stress these words because they show that Mr Eyeson-Annan was appointed as the authorised representative because of his status as a migration agent.

25 Section 441G provides:

> (1) If:
>
> (a) a person (the ***applicant***) applies for review of an RRT-reviewable decision; and
>
> (b) the applicant gives the Tribunal written notice of the name and address of another person (the ***authorised recipient***) authorised by the applicant to do things on behalf of the applicant that consist of, or include, receiving documents in connection with the review;
>
> the Tribunal must give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant.
>
> Note: If the Tribunal gives a person a document by a method specified in section 441A, the person is taken to have received the document at the time specified in section 441C in respect of that method.
>
> (2) If the Tribunal gives a document to the authorised recipient, the Tribunal is taken to have given the document to the applicant. However, this does not prevent the Tribunal giving the applicant a copy of the document.
>
> (3) The applicant may vary or withdraw the notice under paragraph (1)(b) at any time, but must not (unless the regulations provide otherwise) vary the notice so that any more than one person becomes the applicant's authorised recipient.
>
> (4) The Tribunal may communicate with the applicant by means other than giving a document to the applicant, provided the Tribunal gives the authorised recipient notice of the communication.
>
> (5) This section does not apply to the Tribunal giving documents to, or communicating with, the applicant when the applicant is appearing before the Tribunal.

26 It is apparent from sub-section (3) that an authority given to an authorised recipient may be varied or withdrawn at any time. The Act is silent on the question of how an authority may be withdrawn. The word "withdrawn" connotes a taking back or a retraction. That taking back or retraction need not be express. But if it is not express there needs to be conduct by an applicant from which it may be implied or inferred that the Tribunal has been informed that an authority is no longer extant.

27 On 6 December 2007, the Tribunal informed the Appellant during its hearing that Mr Eyeson-Annan had been suspended as a migration agent. Discussion then took place as to whether its decision would be sent to the Appellant and, if so, at what address. The Appellant indicated that he wished it to be sent to him. At the conclusion of the hearing the Tribunal member said:

> So I suggest we'll conclude the hearing now but after – immediately after the hearing you fill in that form with the help of the interpreter and the hearing officer and that will be the address we'll be sending you the decision, okay and notifying you of the handing down of the decision. Okay.

28 Although the position is not as clear as might be hoped it is to be inferred from this episode that the Appellant communicated to the Tribunal that the consequence of Mr Eyeson-Annan's suspension as his migration agent was that he wished to receive the decision himself. It may reasonably be inferred that the Tribunal was informed that Mr Eyeson-Annan's authority was no longer extant. Accordingly, it should be concluded that his authority was withdrawn under s 441G(3).

29 The notice of intention to hand down the decision was sent by facsimile to Mr Eyeson-Annan on 12 December 2007 as was the decision itself on 20 December 2007. However, because his authority had been withdrawn, sending the letters to him did not engage s 441G(2), and as a result that there was no corresponding deeming that the Appellant had received them. Both communications were also expressed to be sent "cc" the Appellant. However, the Tribunal has no postal log of that occurring and the Appellant denies it. I would infer that it was not sent to him and hence that there was no compliance either with s 430A(4)(b) or with s 430B(6)(b). That, however, is not the end of the matter for neither of those failures is jurisdictional. A failure to comply with the obligation to notify an applicant of an intention to deliver a decision in s 430A was held to be non-jurisdictional by Hely J in *SZAMO v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA

943 at [13] and likewise by Graham J in *SZBPF v Minister for Immigration and Multicultural Affairs* [2005] FCA 1532 at [12]-[13]. There is no reason to doubt the correctness of either of those decisions.

30 So too, a failure to comply with a statutory duty to provide reasons after the cancellation of a visa has been held not to be a jurisdictional error: *Re Minister for Immigration and Multicultural and Indigenous Affair; ex parte Palme* (2003) 216 CLR 212 at 225-226 [44]-[48] per Gleeson CJ, Gummow and Heydon JJ, 227-228 [54]-[58] per McHugh J. Similar reasoning applies to the duty to provide reasons in s 430B(6): see *SZFLM v Minister for Immigration and Citizenship* [2007] FCA 863 at [4] per Madgwick J. It follows that although non-compliance with s 430A(4)(b) and s 430B(6)(b) is established no relief can be granted because neither was a jurisdictional error.

31 Before me the Minister correctly noted that this argument had not been run before the federal magistrate. Two matters flowed from that. First, it was said that as a matter of discretion the ground should not be permitted to be raised. Given the nature of the point and the absence of prejudice to the Respondent, however, it seems appropriate to permit it to be entertained. Secondly, it was said that it was possible the Court might not have jurisdiction to entertain the point. Shortly, that argument was that because this Court has no original jurisdiction by reason of s 476A of the Act, it followed that the entertaining of a ground not raised before the learned Federal Magistrate necessarily entailed an exercise of that proscribed original jurisdiction. Flick J noted this argument in *SZLZM v Minister for Immigration and Citizenship* [2008] FCA 1263 at [18] but did not decide it since it was unnecessary to do so. Not having heard full argument on the matter, and it not being necessary, I take the same course. However, any such argument would need to accommodate the Full Court's decision in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at 434-435 [20], 438-440 [34]-[39] per Allsop J with Drummond and Mansfield JJ agreeing, and *Applicant NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 214 at 218-219 [21] per Carr, Kiefel and Allsop JJ.

32 Each of the grounds of appeal not having been made out, the appeal must be dismissed with costs.

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

Associate:

Dated: 19 September 2008

The Appellant appeared in person.

Counsel for the First Respondent: S A Sirtes

Date of Hearing: 29 August 2008

Date of Judgment: 19 September 2008