FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZYYY v MINISTER FOR IMMIGRATION & ANOR *[2013] FMCA 34*

MIGRATION – Application for review of Refugee Review Tribunal decision – grounds of application all constituting merits review – Refugee Review Tribunal findings open on materials – no jurisdictional error shown.

Migration Act 1958, ss.36(2)(a), 36(2)(aa), 91R, 91R(2)

MZXMM v Minister for Immigration and Citizenship [2007] FMCA 975
SZNXQ v Minister for Immigration and Citizenship [2009] FMCA 1223

Applicant:	MZYYY
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	MLG 788 of 2012
Judgment of:	Burchardt FM
Hearing date:	21 November 2012
Date of Last Submission:	21 November 2012
Delivered at:	Melbourne
Delivered on:	31 January 2013

REPRESENTATION

The Applicant:	In person (assisted by interpreter)
Counsel for the First Respondent:	Ms Costello
Solicitors for the Respondents:	Clayton Utz Lawyers

ORDERS

(1) The application is dismissed.

(2) The Applicant pay the First Respondent's costs in the sum of $8,371.00 which sum includes reserved costs in the sum of $1,900.00.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT MELBOURNE

MLG 788 of 2012

MZYYY
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

And

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") dated 5 June 2012. The application and the supporting affidavit are relevantly in identical terms.

2. The grounds of application are asserted to be "the decision of the Tribunal was made without jurisdiction or is affected by an error of jurisdiction". The particulars in the application set out at subparagraphs 1(a) to 1(j) inclusive are all clearly on their face matters of impermissible merits review.

3. The applicant has filed contentions of fact and law pursuant to orders made by Registrar Caporale on 27 July 2012. Those contentions which purport to have been prepared by the applicant would appear to have been drafted by someone else. Remarks are made both in the first person singular and in the plural. In addition to addressing the grounds of application, the written submissions also raise the complementary

protection provisions contained in s.36(2)(aa) of the *Migration Act 1958* ("the Act").

4. At the hearing before the Court, the applicant's oral submissions concentrated upon the alleged errors of fact made by the Tribunal. The applicant also addressed in reply issues to do with a Wikipedia extract mentioned by the Tribunal, a matter to which I will return, and for the first time raised an issue of bias. The applicant asserted that the member had taken the decision before he was heard, and that he had no chance to explain things properly. It was asserted that each response made by the applicant provoked the Tribunal member to say that she did not believe him.

The materials in the case

5. It is uncontroversial that the applicant arrived in Australia on 1 July 2008 on a vocational education and training sector visa. He was granted a further such visa on 15 October 2010.

6. On 10 May 2011, the applicant departed for India from where he returned on 7 July 2011.

7. On 12 September 2011 he applied for a protection visa which the delegate refused to grant. It should be noted that the applicant did not respond to the delegate's invitation to arrange an interview (see CB78).

8. The applicant's grounds of application are set out at CB29-34 inclusive. Put shortly, they assert a risk of harm to the applicant on the basis of possible attacks by the Telangana people and more particularly, the risk of harm upon the applicant because of his role as a youth president with the Congress party. Although the Telangana people are differentiated to an extent in the written submissions on a racial basis, it is clear that the crux of the applicant's claims was fear of persecution on the basis of his political opinions and activities as a member of the Congress party to which the Telangana parties were opposed.

9. As earlier indicated, the delegate did not accept the applicant's assertion. At CB86 the delegate's finding was expressed as:

> *"Based on the lack of details in the applicant's claims and the fact that I had no opportunity to explore his claims or their*

veracity, I am not satisfied that the applicant has been threatened or attacked by Telangana members or supporters because he is supporter/member of the Congress party."

10. The delegate also considered the question of State protection, and concluded at CB87:

> *"I am not satisfied that the Indian authorities would therefore fail to or not protect the applicant for a Convention reason."*

11. The applicant sent further material in support of his application to the Tribunal, which is at CB113-117, in which the applicant responded to the delegate's findings. He took issue with the proposition enunciated by the delegate that the applicant could relocate in India, explained the difficulties that he had suffered on his more recent return to India, asserted that he would be in a position to provide further information and documentation that he was a member of the Congress party and involved in politics, and took issue with the fact that the delegate had found the delay in his application for a protection visa was of note. He took issue with the delegate's findings generally and, in particular, further, the delegate's conclusion about State protection.

12. The applicant forwarded with his application a medical certificate dated 18 June 2011 (CB123), which states:

> *"This is to certify that (applicant) Aged: 27 Years was under my treatment and was advised bed rest for 15 days."*

13. The applicant also included a note from the NSUI ("the National Students Union of India"), undated, from its purported president, a Mr Reddy, purporting to confirm his activities on behalf of the Congress party.

The Tribunal's decision

14. The Tribunal's decision commences by setting out the details of the application and the relevant law. It should be noted that the Tribunal expressly set out details of the complementary protection criterion in s.36(2)(a) (paragraphs 17-19, CB132).

15. From paragraphs 20 and following, the Tribunal recorded the claims and evidence. The Tribunal set out in full the applicant's statement

accompanying his application and his five-page written statement after the delegate's decision. The Tribunal noted the photographs provided by the applicant in support of his application, the medical certificate, the letter from Mr Reddy, a copy of an airline ticket that the applicant had booked to fly from Melbourne to Hyderabad and back, and an article from Wikipedia about Dr Jayaprakash Narayan.

16. The Tribunal records at paragraphs 29-49 (CB138-142) the course of the proceedings before the Tribunal.

17. Those passages, without setting them out seriatim, seem to me to show an unexceptionable process whereby the Tribunal member raised matters with the applicant to elicit further information. It should be noted that while the Tribunal raised with the applicant various concerns about his evidence, the applicant's oral submission made at the hearing before the Court that the Tribunal responded negatively and unbelievingly to everything he said is not in any way borne out by the Tribunal's decision.

18. The Tribunal's observation at paragraph 46 (CB141):

> *"I advised the applicant that it was difficult for me to see that the political profile he had was so potent so as to prompt the continuing threats and harassments he claims to have experienced …"*

was scarcely indicative of the bias the applicant asserted. I note that the Tribunal raised with the applicant expressly the question of relocation within Hyderabad or Andhra Pradesh.

19. I note further that the Tribunal found at paragraph 48 (CB141) in respect of the applicant's not responding to the delegate that:

> *"The placement of this invitation in the correspondence to the applicant does not seem to me to reflect the importance of the opportunity to attend an interview and it is not surprising that an applicant may not notice and appreciate its significance."*

20. This finding was in the applicant's favour, bearing in mind that he had not attended before the delegate.

21. I should also note that the applicant was given two further weeks to provide further documentary evidence in support of his claims

including, in particular, evidence that reports were given to the police and more detailed information about the injuries the applicant claimed to have sustained when he was attacked. The Tribunal gave the applicant the opportunity to apply for a short extension of further time if necessary. No further material was received.

22. At paragraphs 52-72 (CB142-146), the Tribunal examined the facts and made findings about them. It is sufficient to say that the Tribunal did not believe the applicant. Putting the matter shortly, the Tribunal did not accept the nature and extent of the applicant's political activity. It gave little weight to the letter from the NSUI (Mr Reddy) because the Tribunal member did not accept that the applicant was in fact involved in the NSUI as a youth co-ordinator. The Tribunal member gave little weight to the medical certificate because there was no indication as to what the certificate was for. Perhaps the most clear indication of the Tribunal's conclusion is given at paragraph 56 (CB143) where the Tribunal stated:

> *"As already stated, I accept that the applicant supports the Congress Party and he may have attended gatherings and rallies from time to time. I accept that the main reason for supporting the party was because his father had done so as does his mother. I consider that the applicant has fabricated the evidence about the nature and extent of his own involvement in the Party and being the Youth President in his area."*

23. That conclusion was, in my view, one that the Tribunal was entitled to reach in the light of the matters advanced by the applicant and the findings and reasons in respect of those matters of the Tribunal.

24. At paragraph 68 the Tribunal continued:

> *"Having considered all of the evidence before me, I consider that the chance of the applicant experiencing any such treatment for the reasons he has given in his protection claims to be very remote and insubstantial. The nature and extent of the applicant's political activity and his association with the Congress Party has not been of a character to have prompted the sustained threats and harassment he has described and I have found that he has not experienced any adverse consequences for reasons political in the past."*

25. Insofar as the applicant's claims might have been thought to be racially based, the Tribunal found at paragraph 71 (CB146):

> *"The applicant has described himself as an Adhraite and claimed that his family moved to Hyderabad, part of what may become Telangana, when he was a child. I have considered whether the applicant's non-Telangana origin has implications for him in the event that he would return to Hyderabad. The applicant was plainly aware of the demands for a separate state of Telangana, an issue long on the agenda for Andhra Pradesh and the national government of India although there are differing policy positions among the major parties on the matter. On the evidence before me, what happens in relation to this matter in the reasonably foreseeable future does not give rise to a real chance that the applicant would face treatment of a kind which could amount to persecution for a Convention reason. Notwithstanding the views of many people in Andhra Pradesh, and it appears the applicant, on the issue, a claim that it would lead a person such as the applicant to face treatment amounting to persecution is highly speculative and far-fetched."*

26. The Tribunal, having concluded at paragraph 72 that the applicant does not have a well-founded fear of persecution for a Convention reason in India now or in the reasonably foreseeable future, went on at paragraphs 73-74 to assess the applicant against the complementary protection criterion and found that:

> *"I have concluded that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to India, there is a real risk that the applicant will suffer significant harm. He does not satisfy the complementary protection criterion for the grant of a protection visa."*

The grounds of application

Ground 1(a) There is no basis for the tribunal coming to the conclusion that the applicant has fabricated the evidence about the nature and extent of his involvement in the party and being the Youth President in his area

27. The applicant's written submissions add nothing to the ground asserted, which is essentially repeated seriatim without more. The first

respondent submits that the finding was open on the evidence, and refers to paragraphs 54, 56 and 59 of the decision.

28. In my view, the first respondent's submission is correct. This is an impermissible endeavour to challenge a finding of fact that was clearly open on the materials.

Ground 1(b) There was ample evidence presented by the applicant that he came to serious harm and the Tribunal has misinterpreted the definition of serious harm

29. Nothing in the applicant's material suggests in what way the Tribunal had misinterpreted the definition of serious harm, although the written submissions filed do refer to s.91R(2) of the Act. In my view, the Tribunal did not err in applying s.91R and the findings of fact that the Tribunal made about the applicant's claims were well-open to it on the materials.

Ground 1(c) There is too much emphasis placed on the credibility of the applicant

30. This is a simple factual assertion that the Tribunal was wrong. It is incapable of establishing jurisdictional error, especially given that the Tribunal's findings as to credibility were, in my view, entirely open to it.

Ground 1(d) The applicant has claimed that he was hit and stabbed and the tribunal has not addressed this issue

31. The Tribunal set out these claims, as the first respondent correctly submits, at paragraphs 62 and 64 of its decision, and addressed them in its general findings at paragraph 66. It is clear that the Tribunal did not overlook these matters and that the Tribunal's findings were open to it on the materials.

Ground 1(e) There is a lot of country information about the corruption that is endemic within the Indian police force and the Tribunal is wrong to conclude that if these incidents had happened

then the applicant and his mother would have reported the incidents to the police

32. It is clear that the Tribunal's findings about this aspect of the materials were well-open to it, and this is a simple factual challenge which does not give rise, in these circumstances, to jurisdictional error.

Ground 1(f) The tribunal was provided with a certificate from the SVS hospital when he was hospitalised, yet the tribunal gives it little weight. On the other hand in March 2008 when he was hospitalised and he did not provide evidence of his stay in hospital, the tribunal then draws an adverse inference

33. I think the Tribunal's finding about the medical certificate was entirely appropriate. The finding in relation to the 2008 hospitalisation is, once again, part of an attack on the Tribunal's fact-finding process in circumstances where, in my opinion, the Tribunal's conclusions were well-open to it.

Ground 1(g) There is ample country information to suggest that if the applicant resumed activities in support of the Congress party if he returns to Hyderabad, he will suffer treatment that will amount to persecution

34. In this regard, the Tribunal found at paragraph 69 that the applicant might seek to take part in activities in support of a Congress party if he returns to Hyderabad or if he lives elsewhere in India. The Tribunal found:

> *"The applicant's political profile, however, is nothing like that of an MLA or of a person with a leadership role; he is not more than an ordinary supporter of one of the largest and most successful parties in India. I do not consider that there is anything more than a remote chance that he could come to serious harm while taking part in activities in support of the Congress Party upon return to India, now or in the reasonably foreseeable future."*

35. This finding was, in my view, well-open to the Tribunal in the circumstances.

Ground 1(h) The tribunal has also erred when it concludes that the chance of the applicant being caught up in outbreaks of generalised violence is remote, as country information would indicate this is not so

36. I note that this aspect of the claim essentially related to communal violence in Hyderabad, and the Tribunal correctly asserted that the applicant had not claimed that he feared harm on account of his religion. The Tribunal had also rejected his claims of possible harm on account of his political activity. The Tribunal's conclusion that the likelihood the applicant would be caught up in outbreaks of generalised violence was remote was one well-open to it on the materials.

Ground 1(j) There was clearly evidence available that as a Congress supporter with strong family connections to the party, there was a real chance of persecution should the applicant be forced to return to India

37. Once again this ground must fail as it is simply an attack on the Tribunal's finding of fact in circumstances where that finding was open to the Tribunal on the materials.

The complementary protection criterion

38. The ground here, not articulated in the claim but in the written submissions filed by the applicant, asserts that "the tribunal has not properly addressed the complementary protection criterion for the grant of a protection visa".

39. In my opinion, the Tribunal's decision dealt fairly and squarely with the complementary protection criterion at paragraphs 72-74 in terms that do not give rise to any proper assertion that the Tribunal fell into any error.

Relocation

40. The applicant refers to relocation, at least in passing, in his written submissions (see paragraph (h)). The Tribunal did not decide the

matter on the basis of relocation and it is not, therefore, necessary to deal with this matter further.

State protection

41. It is clear that the Tribunal was of the view that the applicant could properly access State protection and, in my view, that finding was open to the Tribunal on the materials.

Wikipedia

42. Counsel for the first respondent, as a model litigant, did take the Court to the passage in the Tribunal's judgment where the Tribunal referred to the Wikipedia article that the applicant himself had brought (paragraph 28 CB138).

43. I note that McInnis FM in *MZXMM v Minister for Immigration and Citizenship* [2007] FMCA 975 at [129]-[130] had found that the Tribunal in that instance committed jurisdictional error because of the unreliable nature of the information on Wikipedia.

44. I further note that Scarlett FM came to a contrary conclusion in the subsequent case of *SZNXQ v Minister for Immigration and Citizenship* [2009] FMCA 1223. His Honour at [36] and [52] made it clear that in his opinion Wikipedia was a source to which the Tribunal could pay regard, although the weight to be given to the material was a matter for the Tribunal.

45. It does not appear that Scarlett FM was referred to in the earlier decision of McInnis FM.

46. For my part, given the broad investigative powers that the Tribunal has, I would incline to Scarlett FM's view, although whether or not relying upon Wikipedia gives rise to jurisdictional error will depend very much on the facts of the particular case, the nature of the information relied on, and the use to which it is put.

47. I accept, however, the first respondent's submission that in this case it is clear that the information was not used to reject the applicant's claim

(see paragraphs 50 and 51, CB142) and it is clear that the Tribunal in this case did not fall into the error identified by McInnis FM.

Bias

48. The applicant for the first time raised in his oral submissions in reply the proposition that the Tribunal was biased against him.

49. The applicant has not put forward any application to adduce transcript of the hearing, nor sought any adjournment to enable him to do so.

50. There is nothing in the Tribunal's Reasons for Decision, including its detailed account of the events at the hearing itself, that gives rise to any possibility that a reasonable and informed observer would form the view that the Tribunal was not capable of bringing an unprejudiced mind to the matter. To the contrary, in the passages to which I have earlier referred, the Tribunal adopts a sympathetic and favourable position to the applicant. This ground must also fail.

Conclusion

51. For the above reasons, none of the grounds advanced by the applicant is made out and it follows that the application must be dismissed with costs.

I certify that the preceding fifty-one (51) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Date: 31 January 2013