FEDERAL COURT OF AUSTRALIA

SZSLG v Minister for Immigration and Border Protection [2013] FCA 1185

Citation:	SZSLG v Minister for Immigration and Border Protection [2013] FCA 1185
Appeal from:	SZSLG v Minister for Immigration and Anor [2013] FCCA 600
Parties:	**SZSLG v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 1285 of 2013
Judge:	**COLLIER J**
Date of judgment:	12 November 2013
Catchwords:	**MIGRATION** – acceptance by Tribunal of well-founded fear of persecution on part of Appellant – no identification of Convention nexus – not immaterial error on part of Tribunal – jurisdictional error – appeal allowed
Legislation:	*Migration Act 1958* (Cth) ss 36(2)(a), 36(2B)(a)
Cases cited:	*House v Defence Force Retirement and Death Benefits Authority* (2011) 193 FCR 112 cited *Jankovic v Minister for Immigration and Ethnic Affairs* (1995) 56 FCR 474 cited
Date of hearing:	12 November 2013
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	27
Counsel for the Appellant:	The Appellant appeared in person with the assistance of an interpreter
Counsel for the First Respondent:	Mr T Reilly

Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The Second Respondent did not appear

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1285 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**SZSLG** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**COLLIER J**
DATE OF ORDER:	**12 NOVEMBER 2013**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Federal Circuit Court in *SZSLG v Minister for Immigration & Anor* [2013] FCCA 600 be set aside.
3. The decision of the Refugee Review Tribunal made on 27 November 2012 be quashed.
4. The decision be remitted back to a differently constituted Tribunal to be heard and decided again according to law.
5. The name of the first respondent be amended to Minister for Immigration and Border Protection.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**SZSLG** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**COLLIER J**
DATE:	**12 NOVEMBER 2013**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 By notice of appeal filed on 5 July 2013 the appellant appeals from a decision of a judge of the Federal Circuit Court of Australia delivered on 21 June 2013 dismissing an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") dated 27 November 2012.

BACKGROUND AND CLAIMS

2 The appellant is a citizen of India who arrived in Australia on 10 February 2012. On 12 March 2012 he applied to the Department for a protection visa. On 1 August 2012 the delegate of the Minister refused the application.

3 The appellant claimed that he worked as a salesman and financial planning consultant for MetLife India Insurance Company ("MetLife") in India. He claimed that because of the global financial crisis, his company failed to deliver promised benefits to his customers. As a result, he claimed that he was attacked by his customers, which included members of the Congress Party. The appellant claimed that his customers from the Congress Party took advantage of the situation and attacked him because he was also a supporter of the Indian National Lok Dal party. Specifically, the appellant claimed that he was physically assaulted

and threatened at his home, that his family were abused, that a truck collided with his motorcycle, knocking both himself and the motorcycle to the ground, and that various items were found damaged on his property. The appellant claimed that these past incidents were all attempts to kill him, but that he was denied state protection because of the Congress Party's influence.

THE TRIBUNAL'S DECISION

4 The Tribunal accepted that the appellant was employed by MetLife to sell policies to the Indian public, that as a result of the global financial crisis customers lost or believed they had lost a considerable portion of their "investment", and that the appellant gave his personal address to a number of customers who took out policies. The Tribunal also gave the appellant the benefit of the doubt in relation to the claimed assault and harassment, and the incident involving him being hit by a truck.

5 However, the Tribunal did not accept that that the appellant's disgruntled customers wanted to kill him. The Tribunal found that the appellant's customers had ample opportunity to kill the appellant if they wanted to. Thus, the Tribunal concluded that they only wished to demonstrate their anger through threats and intimidation. Nonetheless, the Tribunal accepted that if the appellant returned to his home region now, there was a real chance and a real risk that those who had mistreated him in the past would harass, intimidate and threaten him in the future, and that over time, this could amount to serious and significant harm.

6 The Tribunal noted the appellant's claim that he was unable to obtain state protection because he was associated with the Lok Dal party. However, in light of its finding on relocation below, the Tribunal did not consider the issue of state protection.

7 The Tribunal found that the appellant could relocate to another part of India because any harm was localised, the appellant had lived in South Korea and Australia, and the appellant agreed that he was educated and could start his life in any part of India. For that reason, the Tribunal held that the appellant could relocate in India to a region outside his place of origin where, objectively, there is no appreciable risk of serious harm. Accordingly, the Tribunal was not satisfied that the appellant was a person to whom Australia had protection obligations pursuant to s 36(2)(a) or (aa) of the *Migration Act 1958* (Cth) ("the Act").

THE PROCEEDINGS IN THE FEDERAL CIRCUIT COURT OF AUSTRALIA

8 In his amended application for judicial review the appellant relied on the following grounds:

> 1. The Tribunal had no jurisdiction to make the said decision because its "reasonable satisfaction" was not arrived in accordance with the provisions of the Migration Act.
>
> 2. The member of the Tribunal erred in that it ought to have held that on the evidence before the Tribunal it was open to the Tribunal to find that the applicant was a refugee within the meaning of the Act. In such circumstances the Tribunal erred in that:
>
> (a) it failed to properly apply the consideration that applicant's for refugee status ought to be given the benefit of the doubt in circumstances where the Tribunal entertained the possibility that the applicant's claims are plausible, which was the case here.
>
> 3. The Tribunal has failed to investigate the applicants claim, specially the grounds of persecution in India. Therefore, the Tribunal's decision dated 27 November 2012 was effected by actual bias constituting judicial error.
>
> Therefore the applicant submit that the Tribunal failed to analyse properly the "future harm" the applicant may face if he has to go back to India.
>
> Hence, due to this failure, the Tribunal had committed a serious jurisdictional error by failing to assess or carry out the "real chance" test, before dismissing the applicant claims.
>
> (Errors in original.)

9 His Honour challenged the appellant's allegation of bias in ground three. As a result, it was withdrawn, which his Honour noted was proper, as there was nothing in the Tribunal's decision record to support such an allegation.

10 In relation to ground one, his Honour found that the Tribunal correctly applied the statutory scheme (save for the premature resort to a finding on relocation discussed below) and that the case presented by the appellant did not cause the Tribunal to be satisfied that the appellant met the applicable criteria.

11 His Honour found that grounds two and three, in substance, sought impermissible merits review and they were not made out.

12 His Honour took issue with the Tribunal's statement at [74] of its reasons that in light of its finding on relocation it did not have to consider the issue of state protection. His Honour disagreed, stating that there are no shortcuts in the reasoning process and that the

issue of state protection is an essential step that cannot be avoided by making a finding on relocation.

13 However, his Honour was ultimately of the view that because the Tribunal specifically referred to s 36(2B)(a) of the Act in its reasons, there could be no doubt that the Tribunal was dealing with the issue of relocation in relation to the complementary protection criteria, which was within jurisdiction. Further, his Honour was satisfied that if the issue of relocation is lawfully dealt with in relation to a claim of complementary protection, that can independently support a decision on a claim for protection as a refugee. His Honour thus found that notwithstanding the Tribunal's failure to address the issue of state protection in relation to the refugee claim, the relocation finding in relation to the protection visa claim supported the Tribunal's decision.

14 The application was dismissed with costs.

THE APPEAL PROCEEDING

15 By notice of appeal filed on 5 July 2013 the appellant relied on the following grounds:

> 1. The FM failed to consider that the Tribunal acted in a manifestly unreasonable way when dealing with the applicant claims and ignoring the aspect of persecution and harm in terms of Sec.91R of the Act. The Tribunal failed to observe the obligation amounted to a breach of Statutory Obligation.
>
> 2. The learned Judge has dismissed the case without considering the legal and factual errors contained in the decision of the RRT.

SUBMISSIONS OF THE PARTIES

16 The appellant filed no written submissions. At the hearing he was self-represented.

17 The Minister submitted, in summary that:

- The decision of the Tribunal cannot be considered to be unreasonable.
- The Tribunal appeared to find that the appellant has a well-founded fear of persecution in his home area without expressly finding that such persecution was for a Convention reason, and in any event the Tribunal found that it would be reasonable for the appellant to relocate within India.

CONSIDERATION

18 The Tribunal considered in detail the appellant's account of events in India, and accepted (at [58]-[61] of the Tribunal's reasons) that:

- He had worked in the financial services industry, including selling financial products to customers on behalf of a multi-national corporation.
- As a result of the global financial crisis in 2010 and its impact on the Indian stock market many of those customers lost – or believed that they had lost – a significant portion of the investments which they had purchased on the appellant's personal recommendation.
- Many of his customers felt that the appellant had betrayed or swindled them, and accordingly wished to kill him.
- Many of those customers had his home address in India.
- If he returned to his area of origin it would not be difficult for former customers to find him and kill him if they wished to.

19 Significantly, however, at [72] of the Reasons for Decision the Tribunal said:

> I accept that if the applicant were to return to his home region now, there is both a real chance and a real risk that those who had sought him in the past, will come to know that he is present at home. I have found that they have no intention of killing him. I find, however, that there is both a real chance and real risk that they, presented with the opportunity in his home area, will continue to harass, intimidate and threaten, the applicant and his family. I accept that over time, cumulatively, that such treatment can amount to serious harm and might amount to significant harm.

20 The Tribunal then went on to find that there is no reason why the appellant could not relocate elsewhere in India ([76]-[80]).

21 As his Honour below observed at [37]-[39], the Tribunal appears to find that the appellant has a well-founded fear of persecution in his home area without expressly finding that such persecution would be for a Convention reason. The Minister submits that the inference which should properly be drawn from this is that, presumably, the Tribunal considered that there was an unstated Convention nexus for its finding that the appellant had a well-founded fear of persecution in his home area. The Minister submits further, however, that even if the Tribunal did not, any error in the decision could only have been in the appellant's favour and would not justify the grant of relief as it could not have affected the

outcome: *Jankovic v Minister for Immigration and Ethnic Affairs* (1995) 56 FCR 474 at 477, *House v Defence Force Retirement and Death Benefits Authority* (2011) 193 FCR 112.

22 I am not persuaded by the Minister's submissions on this issue.

23 At [39] of the primary judgment his Honour observed that:

> … the obligation of decision makers under the Migration Act in relation to a claim that a person is a refugee is to consider whether the applicant has a well-founded fear of persecution in his country of origin *for a Convention reason.* There are no shortcuts to that reasoning process.
> (Emphasis in original.)

24 I consider that this statement of his Honour accurately states the law.

25 In *Jankovic* at 477 the Full Court observed that an immaterial error does not vitiate the decision. In my view the apparent failure of the Tribunal in this case to come to grips with the question whether the appellant actually had a well-founded fear of persecution for a Convention reason goes to the heart of its decision. Although the Tribunal found that the appellant could relocate, it is difficult to see how such a finding could be made without a proper appreciation of the appellant's circumstances and whether there was a Convention reason for his well-founded fear of persecution.

26 Although this is not a ground specifically pleaded by the appellant, it was clear this morning that the Minister's legal representatives were in a position to meet this issue.

27 I consider that this is an error of the Tribunal which warrants the decision of the Tribunal being set aside. The appropriate order is to allow the appeal, set aside the decision of the Tribunal, and remit the case to the Tribunal for rehearing.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier.

Associate:

Dated: 12 November 2013