FEDERAL COURT OF AUSTRALIA

SZMBL v Minister for Immigration and Citizenship [2009] FCA 622

MIGRATION – appeal – appellant complained about conduct of migration agent during second hearing before Refugee Review Tribunal – whether Tribunal had duty to initiate enquiries – whether Tribunal failed to obtain important information on a critical issue that was readily available – whether case is rare and exceptional and arises from special circumstances

Migration Act 1958 (Cth) s 91R

SZIZO v Minister for Immigration and Citizenship (2008) 172 FCR 152 discussed
SZJGV v Minister for Immigration and Citizenship (2008) 247 ALR 451 cited

SZMBL v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 161 of 2009

NORTH J
22 MAY 2009
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 161 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZMBL**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **NORTH J**

DATE OF ORDER: **22 MAY 2009**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The appellant pay the first respondent's costs of the appeal.

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 eSearch on the Court's website.

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JUDGE: **NORTH J**
DATE: **22 MAY 2009**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 Before the Court is an appeal from a judgment of the Federal Magistrates Court delivered on 10 February 2009. The Federal Magistrate dismissed an application for review of a decision of the Refugee Review Tribunal (the Tribunal) signed on 25 January 2008. The Tribunal affirmed the decision of the delegate of the first respondent, the Minister for Immigration and Citizenship (the Minister), not to grant the appellant a protection visa.

2 The appellant is a citizen of Bangladesh. In his visa application he indicated that he had worked as a railway porter in Bangladesh between 1994 and 1998. The appellant lived in Singapore from 1998 to 2004 and worked there as a construction worker. He came to Australia in February 2007. The delegate rejected the appellant's claim based on a fear of persecution as a porter or construction worker in Bangladesh on the grounds that it disclosed no Convention reason.

3 The appellant then instituted an application to the Tribunal which fixed a hearing for 4 July 2007. On 2 July 2007 the migration agent then acting on behalf of the appellant sent a

letter by fax seeking an adjournment on the basis that the appellant needed time to formulate a new claim based upon a fear of persecution on the grounds of political opinion.

4 The Tribunal adjourned the hearing until 19 July 2007. At that hearing the appellant's agent was present. During the hearing the appellant made claims that he was active in student politics and was a college president of the student arm of the Awami League between 1991 and 1996. He said he was involved in a protest in Dhaka in 1993 which resulted in a criminal charge being laid against him. The charge had not been determined when he left Bangladesh but in 2004 he heard that the case had finished and nothing had happened as the charges were fraudulent. He said he was attacked in 1993 by members of a rival party and spent two weeks in hospital with a leg injury but the police did not act when he made a complaint.

5 The appellant then said that in 1996 he was arrested and tortured by the army over three days following elections which were boycotted by the Awami League. He was told that if he gave up his political activities the army would let him go. When he was released he and his family decided he would have to leave Bangladesh and he then went to Singapore. He said that in Singapore in 2001 he became a member of an informal Awami League group that met about once a month and provided assistance to people from Bangladesh. He continued to be politically active in Australia and went to a protest in Canberra in late May 2007. As a result of these activities he claimed that his picture and name were in newspapers in Bangladesh and on the internet, and that people from a rival party had threatened his family in June 2007. Because of this publicity he said he would be arrested and killed if he returned.

6 Following the hearing on 19 July 2007, the appellant wrote to the Tribunal in October 2007 indicating that he had terminated the services of his agent because the agent had not treated him fairly. On 25 October 2007 the Tribunal wrote to the appellant inviting him to comment on the fact that no mention had been made of his political activities until the letter from his agent dated 2 July 2007. On 19 November 2007 the appellant sent a letter to the Tribunal explaining that he had written out his life story for the purpose of preparing his application for his agent but the agent did not submit it for him. Furthermore, the agent had threatened that he would not longer assist the appellant unless he did not say anything about his political activity to the Tribunal at the hearing on 19 July 2007.

7 Then at the final hearing before the Tribunal on 23 November 2007 the appellant appeared without his agent and said that the agent had earlier advised him very strongly not to put forward his political claims.

8 The Tribunal in its decision rejected the appellant's political claims. It found that they were entirely untrue and were raised at the last minute to strengthen the appellant's case. The section of the Tribunal's reasoning relevant to this appeal is as follows:

> The Tribunal has major concerns about the applicant's claims about his political involvement and activity with the Awami League. These arise firstly out of the applicant's failure to make these claims until two days before the first scheduled hearing. The applicant has explained that this was due to the poor advice and influence of his agent, who told him not to raise the issue. The Tribunal finds this inherently implausible, especially as the applicant gave the impression of being an articulate and intelligent man, who would have an understanding of the process of a protection visa application. He has shown, since his agent ceased to act for him, that he is well able to prepare and argue his case before the Tribunal.
>
> Further, the information provided to the Tribunal about the applicant's Awami League involvement has become more detailed over the course of the review. The initial claims made at the hearing on 19 July 2007 were very basic. The subsequent submission from the applicant, provided on 19 November 2007, ran to 13 pages of typed English translation. According to the applicant, it was this document which he prepared for the agent at the time of the review application. It contains a wealth of detail not mentioned by the applicant prior to its submission on 19 November 2007. The applicant's explanation for this (that he only mentioned the important things at first) is not accepted as plausible. There are events in the written statement which are of considerable import, but were simply not raised by the applicant in his oral evidence. The Tribunal is of the view that, if they were true, these important events would have been mentioned at the first hearing.

9 The appellant applied to the Federal Magistrates Court for a review of the Tribunal's decision. Ground 3 of the application before the Federal Magistrates Court was as follows:

> The applicant made allegations to the Tribunal against the Migration Agent. In light of the allegations, the relevance of the allegations to a fair determination of the applicant's case, and the difficulty the applicant had in himself investigating the allegations, the Tribunal should have investigated the allegations. Its failure to do so gave rise to jurisdictional error.

10 The Federal Magistrate rejected this ground as follows:

> 86. In support of this ground, counsel cited *Minister for Immigration & Citizenship v Le* (2007) 164 FCR 151. In that case, Kenny J at [60] – [67] considered and applied a long line of authority recognising some situations which are exceptional to the established proposition that "the Tribunal has no general obligation to initiate enquiries or to make out an applicant's case for

him or her". In some cases, a decision of the Tribunal has been characterised as made unreasonably in a jurisdictional sense, if it failed to obtain important information on a critical issue, which it knew or ought reasonably to have known was readily available to it.

87. Kenny J held in that case that the Tribunal should have inquired into the qualifications of an interpreter at a Departmental interview, whose interpretation of a critical admission was called into question. She characterised the case as "rare and exceptional", and the inquiries which she thought were required as "not difficult to make and straightforward" (see [77] – [79]). Similar conclusions have been reached in other recent cases (cf. *SZJBA v Minister for Immigration & Citizenship* (2007) 164 FCR 14 at [59] – [60], and *SZIAI v Minister for Immigration & Citizenship* [2008] FCA 1372 at [29]). However, all the authorities have emphasised that the obligation to initiate inquiries is exceptional, and arises from some special circumstance in the procedures followed by the Tribunal, in which there is "readily available and centrally important" information which it is obviously reasonable to expect the Tribunal to obtain (cf. *SZICU v Minister for Immigration & Citizenship* [2008] FCAFC 1 at [29]).

88. In the present case, the Tribunal in November 2007 received complaints from the applicant in writing about his migration agent, in response to its written invitation that he should address the implications of the delay in his presenting his 'political' claims, both to the Department of Immigration and then to the Tribunal. The Tribunal was aware that the applicant had terminated the employment of his agent in October 2007, at a time when its file confirmed that there were difficulties communicating with the migration agent. It afforded the applicant the opportunity to attend a hearing to explain again his delay in making his claims and how his agent was responsible. It considered the applicant's evidence, but made no other inquiries into the matter. There is no evidence suggesting that it ever contemplated taking other steps to investigate the applicant's complaints about Mr Solaiman, nor that the applicant requested or expected this.

89. In these circumstances, I do not accept that there was any special or exceptional reason for the Tribunal to have taken any further inquires into the applicant's complaints about Mr Solaiman. The applicant's submissions to me were unable to identify with precision the suggested inquiries, and the information which would then have been discovered by the Tribunal. In effect, it is only suggested that the Tribunal should have conducted a disciplinary inquiry of the sort conducted by the Migration Agents Registration Authority into a complaint. However, plainly this was not its statutory function.

90. It is suggested that there were oral inquiries of Mr Solaiman, and summons powers in relation to Mr Solaiman's file and Mr Solaiman, which could have been pursued by the Tribunal. However, no particular 'readily available' information which could have verified the applicant's complaints was pointed to. Significantly, the applicant has now had available the coercive powers of the Court both in relation to Mr Solaiman's testimony and his file, but he was unable to present to the Court any information which the Tribunal could have easily discovered, and which would have verified the applicant's present explanation for the delay in making his 'political' point.

> 91. Moreover, this ground sits uncomfortably with Ground 2. If, as I have above accepted, the Court itself inquires into whether Mr Solaiman fraudulently withheld the applicant's 'political' claims from both the Department and the Tribunal until July 2007, then it would seem to be immaterial to the existence of jurisdictional error whether, and how, the Tribunal made the same inquiry. I have not been persuaded to accept allegations by the applicant which are, indeed, more serious than those made to the Tribunal. There now seems no reason for remitting the matter to allow the same allegations to be further investigated by the Tribunal.
>
> 92. I am therefore not persuaded that any jurisdictional error occurred as argued in Ground 3. I also would have refused relief which might have arisen from any defects in how the Tribunal investigated the applicant's complaints about Mr Solaiman, as a result of my findings in relation to Ground 2.

11 On 26 February 2009 the appellant filed a notice of appeal in this Court. He also filed an amended notice of appeal in Court and sought to rely on ground 1 of the amended notice in the following terms:

> His Honour erred in finding there was no exceptional or special reason for the Tribunal to have taken any further inquiries into the appellant's complaints about his representative at the Tribunal in circumstances where in the absence of such inquiry there remained two untested and diametrically opposed views about why the appellant failed to make his critical political claim in his protection visa application ('PVA').

12 The essence of the appellant's argument was articulated in written submissions as follows:

> 67. …[T]here was diametrically opposed information before the Tribunal about the reason the appellant did not make the political claim in the PVA, and without resolving that critical issue the Tribunal constructively failed to exercise its review task.
>
> 68. Bearing in mind that Mr Solaiman attended the first hearing and contined to communicate with the Tribunal via email thereafter, it was unreasonable for the Tribunal not to have made some enquiries of Mr Solaiman regarding the exact nature and circumstances under which the PVA was made, who typed it, whether he in fact advised the appellant not to highlight the political claim as claimed.

13 There is no general duty on the Tribunal to make inquiries. The Federal Magistrate identified the relevant test to be applied when considering whether a duty to inquire arises and he applied that test to the circumstances of the case. The emphasis in the appeal was on an allegation that the Tribunal acted unreasonably because there were diametrically opposed versions of the reason for the appellant not including the political claims in the visa

application and the Tribunal was bound to resolve the conflict by making inquiries of the agent.

14 This is not a proper characterisation of the situation facing the Tribunal. It had different explanations from the appellant on different occasions as to the omission of the political claim. In November 2007 the appellant's version of events was that he had written a comprehensive account of his political activities and the agent had failed to lodge it as part of the visa application and had threatened him not to say anything about the claim in the July hearing. The agent was not present when these allegations were made. The Tribunal was entitled to take the view that this explanation was so improbable that it could reasonably be rejected without further inquiries.

15 The Federal Magistrate did not err in concluding that the Tribunal did not fall into jurisdictional error by refraining from making inquiries of the agent about the circumstances in which the political claims were not included in the visa application.

16 The Federal Magistrate stated that even if he had determined that the Tribunal failed to inquire about the circumstances of the absence of the political claim from the visa application he would have refused relief on discretionary grounds because there would be no utility in remitting the matter to the Tribunal.

17 One of the arguments presented to the Federal Magistrate was that the agent had committed fraud on the Tribunal by acting contrary to the appellant's instructions by failing to include the political claim in the visa application. The Federal Magistrate rejected this argument and made findings that the agent had acted in accordance with his instructions. Any inquiry as sought by the appellant therefore would not assist him because such inquiry would confirm that the political claims only came into existence shortly before the hearing on 19 July 2007.

18 In *SZIZO v Minister for Immigration and Citizenship* (2008) 172 FCR 152, Lander J (with whom Moore and Marshall JJ agreed) stated in relation to *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 and *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 the following (at [97]):

> It should be only in exceptional circumstances that a Court should refuse to issue the constitutional writs once the Court has determined that the Tribunal had failed to comply with its imperative statutory obligations to an applicant seeking the review of a decision of the delegate refusing the applicant a protection visa. If it were otherwise, and the Court were required to inquire into the extent to which the failure by the Tribunal to comply with its statutory obligations to accord an applicant a fair hearing prejudiced the applicant, the imperative obligation imposed on the Tribunal might well be blunted.

The appellant contended that on this approach relief would not be refused in the present case on the basis of inutility. Although the issue does not need to be determined I accept the first respondent's submission that the present case does not involve imperative statutory obligations within the meaning of that judgment.

19 Further, I agree with the Federal Magistrate that there is a strong discretionary reason in favour of refusing relief. The inquiry which the appellant contended that the Tribunal should have conducted had to be undertaken by the Federal Magistrate in the context of the challenge to the Tribunal's decision. It would be odd, to say the least, if the Federal Magistrate had concluded that the appellant had not instructed the agent to include the political claim and yet remitted the matter to the Tribunal to determine that very same question. This is the more so when it is appreciated that both parties subpoenaed the agent to give evidence before the Federal Magistrate but neither side called on the subpoena. The agent answered the subpoena by filing an affidavit in which he set out his version of events. The appellant sought to tender the affidavit without calling the agent and intended to invite the Federal Magistrate to find that the contents of the affidavit were false. The Federal Magistrate upheld the first respondent's objection to such a course.

20 Following discussion with the Court the appellant's counsel applied to amend the second ground of appeal. The application was refused as the proposed ground had no hope of success. It asserted that the Tribunal had failed to consider the appellant's risk of future persecution in Bangladesh when the reasons of the Tribunal on their face clearly showed that the Tribunal had given consideration to the very issue. Further reasons for dismissing the ground were given orally by the Court during the hearing. The original form of the ground alleged errors which on their face did not amount to jurisdictional errors. The written submissions similarly failed to identify any arguable jurisdictional errors. It is desirable that

the first respondent move the Court prior to the hearing in such circumstances to have such groundless allegations rejected before written submissions are required.

21 Ground 3 of the amended notice of appeal concerned the application of s 91R(3) of the *Migration Act 1958* (Cth) which provides:

> (3) For the purposes of the application of this Act and the regulations to a particular person:
>
> (a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;
>
> disregard any conduct engaged in by the person in Australia unless:
>
> (b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

22 The Tribunal found that the appellant engaged in political activity to strengthen his claim for protection. It then stated:

> Consequently, given the provisions of section 91R(3), the Tribunal disregards the applicant's conduct in Australia in determining whether the applicant has a well-founded fear of being persecuted for one or more of the Convention reasons.

23 In the immediately following paragraph the Tribunal said:

> The applicant claims that his family in Bangladesh was threatened in June 2007. Given the Tribunal's serious reservations about the genuineness of the applicant's claims and of his evidence as a whole the Tribunal is not satisfied that such threats occurred.

24 The appellant argued that the reference to "evidence as whole" included a reference to the evidence about the appellant's activities in Australia. If that were so the inclusion of consideration of evidence about the appellant's activities in Australia would be contrary to s 91R(3) which required such evidence to be disregarded where, as here, the Court has found that those activities were undertaken to strengthen the appellant's claim: see *SZJGV v Minister for Immigration and Citizenship* (2008) 247 ALR 451.

25 This argument should not be accepted. The reference to evidence as a whole read in context excludes the evidence of the appellant's Australian conduct. It is unreal to suggest

that the Tribunal having just said that it disregards the appellant's conduct in Australia, in the next sentence contradicts itself. That this is not the case is confirmed by the reference in the concluding summary four paragraphs later where the Tribunal repeats:

> [I]t has disregarded his politically related conduct in Australia since July 2007 as it is not satisfied that he engaged in that conduct otherwise than for the purpose of strengthening his claim to be a refugee.

26 It follows from these reasons that the appeal will be dismissed.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North.

Associate:

Dated: 9 June 2009

Counsel for the Appellant:	Dr J Azzi
Counsel for the First Respondent:	Mr T Reilly
Solicitor for the First Respondent:	DLA Phillips Fox
Date of Hearing:	21 May 2009
Date of Judgment:	22 May 2009