

FEDERAL COURT OF AUSTRALIA

SZMNS v Minister for Immigration and Citizenship [2009] FCA 777

Migration Act 1958 (Cth)

SZMNS v MINISTER FOR IMMIGRATION & CITIZENSHIP and ANOR

NSD 244 of 2009

**EMMETT J
28 MAY 2009
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

NSD 244 of 2009

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: SZMNS
 Appellant**

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

**REFUGEE REVIEW TRIBUNAL
Second Respondent**

JUDGE: EMMETT J

DATE OF ORDER: 28 MAY 2009

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent's costs in the sum of \$4,200.
3. The affidavit be filed in court.

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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DATE: 28 MAY 2009

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 This is an appeal from orders of the Federal Magistrates Court dismissing an application for Constitutional writ relief in respect of a decision of the second respondent, the Refugee Review Tribunal (**the Tribunal**). The appellant appeared in Court in person without legal assistance. However, he had assistance from an interpreter.

2 The appellant had filed no submissions in support of his appeal. He asserted from the bar table that he had not received a copy of the reasons of the Federal Magistrates Court and that he had not received a copy of the appeal book. However, he did receive a letter from the Registrar of the Court notifying him of the hearing today. There is evidence before me that, by letter of 1 April 2009, the Federal Magistrates Court sent a copy of the reasons of the federal magistrate to the address for service, being the address to which the Registrar wrote.

3 On 6 April 2009, the solicitors for the first respondent, the Minister for Immigration and Citizenship (**the Minister**), wrote to that address enclosing the appeal book. Having said that he did not receive those documents, the appellant nevertheless informed the Court that he

was content for the appeal to proceed today. He did not wish to make any submissions in support of the appeal.

4 The appellant is a citizen of India and arrived in Australia on 9 January 2008 and applied for a Protection (Class XA) visa on 10 January 2008. On 12 February 2008, a delegate of the Minister decided to refuse to grant a visa. The appellant was notified of that decision by letter of 14 February 2008.

5 On 10 March 2008, the appellant applied to the Tribunal for review of the delegate's decision. On 11 June 2008, the Tribunal affirmed the decision not to grant a protection visa. On 18 July 2008, the appellant commenced a proceeding in the Federal Magistrates Court seeking judicial review of the Tribunal's decision. An amended application was lodged on 17 October 2008 specifying eight grounds on which it was contended that the appellant was entitled to Constitutional writ relief in respect of the Tribunal's decision. On 5 March 2009, after a hearing on that day, the Federal Magistrates Court ordered that the application be dismissed and that the appellant pay the Minister's costs. By notice of appeal filed on 25 March 2009, the appellant appeals to the Federal Court from the orders of the Federal Magistrates Court.

6 In the findings and reasons section of the decision record of the Tribunal, the Tribunal indicated that it accepted that the appellant is an Indian national and assessed his claims in relation to India. The Tribunal said that the appellant claims to fear persecution at the hands of three students affiliated with the Students Federation of India (**SFI**) and at the hands of thugs who act on their behalf. The Tribunal recorded that the appellant claimed that the Communist Party of India (Marxist) (**CPIM**) led government in Kerala and its agents will deny him protection from his opponents for political reasons.

7 The appellant contended before the Tribunal that his persecutors could find him anywhere in India and that he would be unable to relocate safely and reasonably to any other place where he would not be at risk of persecution. The Tribunal found that the appellant is not a person who has suffered Refugees Convention (**Convention**) related persecution in India. The Tribunal set out its grounds, which may be summarised as follows.

8 The appellant travelled to New Zealand in late 2007. He failed to raise any concerns there about his welfare in India and failed to seek refugee status. The Tribunal considered that that was compelling evidence that he did not fear persecution in India at that time. The Tribunal considered that the appellant's stay in India from October 2007 for three months reinforced its concern that he did not fear persecution in India. The appellant provided no persuasive reason for his willingness to return to India if, as he claimed, there were Kerala based thugs or CPIM activists capable of tracking him down and motivated to harm him.

9 The Tribunal observed that at the hearing the appellant emphasised that he had decided to go abroad in the first place after concluding that a particular group could find him anywhere in India, even in Bangalore or Mumbai. The Tribunal found that the appellant's return to India in late 2007 and his stay there for three months was compelling evidence that he did not fear persecution in India for any reason. The Tribunal recorded that it discussed with the appellant country information indicating that there is endemic violence in politics in Kerala and in particular between the CPIM and its student wing, the SFI, on the one hand and the Indian National Congress (**INC**) and the Kerala Students Union (**KSU**) on the other.

10 The Tribunal noted that in expressing his support for former Chief Minister Chandy, the appellant indicated his allegiance to the INC. His claimed involvement with the KSU at college is consistent with that stance. The Tribunal accepted that the appellant's claims conformed to the available country information. However, the Tribunal did not consider that that established that the appellant is a person who had been or was a person involved with such political activities and the accompanying violence.

11 The Tribunal did not accept that the appellant had any political profile either directly or through his association with the KSU. The Tribunal did not accept that he was personally involved in any incidents of political violence that continued to motivate anyone linked with the CPIM to pursue him. The Tribunal recorded that the appellant had claimed that a new and heightened level of danger arose with the election of the CPIM Government in May 2006. He claimed that that had emboldened a particular group to step up pressure on those who might be willing to give evidence against them in any criminal trial and to pursue old vendettas. The Tribunal did not accept that claim having regard to the group's failure to take

any decisive action, the appellant's delayed departure from India even after obtaining his passport in 2006 and his return to India from New Zealand.

12 Having regard to the concerns expressed by the Tribunal in some detail, the Tribunal found that the appellant's refugee claims were not based on any direct personal experience. Rather, the Tribunal considered that the claims had been fabricated for the purposes of his application for a protection visa. The Tribunal considered that the claims were based on the appellant's direct knowledge of campus politics at his college and more generally his knowledge of politics in Kerala. The Tribunal accepted that the appellant favours the INC and was associated with the KSU while at college. It also accepted that it was plausible that he may have known some individuals who were involved with political clashes at the college.

13 However, the Tribunal rejected the appellant's claims that he was an activist in the KSU on campus. It also rejected his claims that he would be so perceived as a result of any friendships he had made. The Tribunal did not accept that while the appellant was at college his friends were targeted in October 2004 and February 2005 as he claimed. The Tribunal did not accept that he would have been harmed had he been present. The Tribunal accepted that the appellant's brother was injured in May 2006 around the time that the CPIM was elected to the state legislative assembly in Kerala. The Tribunal accepted that that could suggest political aspects to the incident but that there could also have been other causes such as criminal activity. The Tribunal found with confidence that the attack was not aimed at intimidating or harming the appellant via his family or in any way linked to clashes and consequent court action.

14 The appellant contended that his problems intensified from May 2006 when the CPIM Government came to power. The Tribunal did not accept, however, that the appellant faced any heightened risk or that he had any political profile that caused the state or any of its agents to deny him protection from any harm that might befall him. The Tribunal observed that the appellant claimed to have tried to relocate to other locations within India but concluded that he could not safely do so because of the political reach of the CPIM. However, since the Tribunal found that the appellant does not face a real chance of persecution in his home or anywhere else in Kerala, it was not necessary for the Tribunal to consider whether he could reasonably relocate to another place in India.

15 The Tribunal concluded that, having considered the appellant's claims individually and cumulatively, there is no real chance that he will face persecution for reasons of political opinion or any other Convention related reason if he returns to India now or in the reasonably foreseeable future.

16 As I have said, in his amended application to the Federal Magistrates Court, the appellant relied on eight grounds. The Federal Magistrate dealt with each of those grounds in some detail and concluded that there was no substance in any of the grounds. Her Honour therefore concluded that no jurisdictional error had been established.

17 In his notice of appeal to the Federal Court, the appellant raises four grounds. The first is that the Federal Magistrates Court erred in that it failed to hold that it was open to the Tribunal to find that the appellant was a refugee. In particular, the ground asserts that the Tribunal erred in failing to apply properly the consideration that applicants for refugee status ought to be given the benefit of the doubt in circumstances where the Tribunal entertained the possibility that the claims of an applicant are plausible. That ground misunderstands both the role of a court reviewing a decision of the Tribunal and the task of the Tribunal.

18 The Federal Magistrates Court had jurisdiction to interfere with the decision of the Tribunal only if it found jurisdictional error. Jurisdictional error is not demonstrated simply because it might have been open to the Tribunal to make different findings of fact. The *Migration Act 1958* (Cth) does not require the decision maker to reach a decision to refuse to grant a visa only if a particular matter is established. Rather, it requires a refusal if the decision maker is not affirmatively satisfied that the criteria for the grant of a visa in question has been satisfied.

19 The Tribunal in fact made findings confidently rejecting the appellant's claims. It was affirmatively satisfied that his claims were not based on his direct personal experiences but were fabricated for the purpose of the application. This is not a case where the Tribunal was under any doubt such that it was required to ask further: what if it is wrong in the conclusions that it has reached? There is no principle applicable in the circumstances of this case that required the Tribunal to give the appellant the benefit of any doubt, assuming that the Tribunal's reasons manifested any doubt, which they do not. I do not consider that there is any substance in the first ground of appeal.

20 The second ground of appeal is that the Federal Magistrates Court erred in failing to conclude that the Tribunal and the Minister's delegate had not dealt in any substantive way with the key component of the appellant's claim that his life will be under threat on his return to India. It is of course the Tribunal's decision and not that of the delegate that was under review by the Federal Magistrates Court. The review by the Tribunal of the delegate's decision is a full merits review and error on the part of the delegate would be irrelevant to any review by the Federal Magistrates Court of the Tribunal's decision.

21 The Tribunal did in fact take into account the appellant's claim that he feared he would be killed by CPIM thugs. That claim was expressly noted by the Tribunal in its summary of the claims made by the appellant in his visa application. The primary judge also noted that the appellant claimed that he would be killed by CPIM thugs. The difficulty for the appellant is that the Tribunal found that the appellant had fabricated his claims for the purposes of his application. It found expressly that it did not accept that the appellant had an adverse profile with the CPIM and its supporters or that he had any political commitment or interest that would motivate him to become politically active in the future. I do not consider that there is any substance in the second ground.

22 The third ground relied on in the notice of appeal is that the Federal Magistrates Court failed to take into consideration the fact that the Tribunal's decision was made without taking into account the full gravity of the appellant's circumstances and the consequences of his claim. That ground appears to be no more than an invitation to undertake merits review or a complaint that the Federal Magistrates Court did not review the merits of the Tribunal's decision. I do not consider there is any substance in that ground.

23 The final ground is that the Tribunal failed to investigate the appellant's claims, especially his claim to fear persecution in India because of his membership of the KSU. No particulars of the failure to investigate are provided in the notice of appeal. It was incumbent upon the appellant to put forward such contentions as he wished to rely on before the Tribunal. It was then a matter for the Tribunal to determine whether it was satisfied that the criteria necessary for the grant of the protection visa was satisfied. The decision record of the Tribunal and in particular the findings and reasons section indicate that the Tribunal in fact

engaged in a thorough examination of the appellant's claims including his claim that he feared persecution because of his membership of the KSU.

24 The Tribunal accepted that the appellant was associated with the KSU at college but rejected his key claims that he was an activist. The Tribunal found, as I have said, that the appellant's refugee claims were fabricated. The Tribunal was not satisfied that the appellant had any well-founded fear of persecution.

25 The final ground asserts that the alleged failure to investigate the appellant's claims was the consequence of actual bias on the part of the Tribunal. However, as the primary judge found, the fact of an adverse finding is not of itself indicative of bias. There is no basis whatsoever for suggesting that the Tribunal was biased or that there is any basis of apprehension of bias on the part of the Tribunal. There is no substance in the fourth ground.

26 It follows, in my view, that there was no error on the part of the Federal Magistrates Court and the appeal should therefore 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 Emmett.

Associate:

Dated: 28 May 2009

The Appellant appeared in person

Counsel for the Respondents: Mr G Johnson

Solicitor for the Respondents: Sparke Helmore

Date of Hearing: 28 May 2009

Date of Judgment: 28 May 2009