FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXSP & ORS v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 374*

MIGRATION – Refugee Review Tribunal – whether finding based on no evidence – right to enter and reside in a third country – whether the Tribunal may give information to only one of a number of applicants – whether the Tribunal may adopt wholesale and verbatim the findings and reasons of the Tribunal as previously constituted – application dismissed.

Migration Act 1958 (Cth), ss.36(3), 415, 422, 424A

Aung v Minister for Immigration and Multicultural Affairs [2000] FCA 1562
Haluba v Minister for Immigration and Ethnic Affairs (1995) 59 FCR 518
Liu v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 541
NAQZ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 200 ALR 662
QAAA of 2004 v Minister for Immigration and Multicultural Indigenous Affairs (2007) 98 ALD 695, [2007] FCA 1918
SZEOO v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1797
SZKDB v Minister for Immigration and Another [2007] FMCA 1036

First Applicant:	MZXSP
Second Applicant:	MZXSQ
Third Applicant:	MZXSR
Fourth Applicant:	MZXSS
Fifth Applicant:	MZXST
Sixth Applicant:	MZXSU
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	MLG 1307 of 2007

Judgment of:	Riley FM
Hearing date:	5 February 2008
Date of Last Submission:	5 February 2008
Delivered at:	Melbourne
Delivered on:	3 April 2008

REPRESENTATION

Counsel for the Applicants:	John A. Gibson
Solicitors for the Applicants:	Erskine Rodan & Associates
Counsel for the First Respondent:	Warren S. Mosley
Solicitors for the First Respondent:	DLA Phillips Fox

ORDERS

(1) The application filed on 24 September 2007 and amended on 21 December 2007 is dismissed.

(2) The applicants pay the first respondent's costs fixed in the sum of $5,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 1307 of 2007

MZXSP
First Applicant

MZXSQ
Second Applicant

MZXSR
Third Applicant

MZXSS
Fourth Applicant

MZXST
Fifth Applicant

MZXSU
Sixth Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for review of a decision of the Refugee Review Tribunal ("the Tribunal"). The first applicant is the spouse of the second applicant and the father of the third, fourth, fifth and sixth

applicants. The first applicant is a citizen of Iraq who was born on 1 July 1973. He fled Iraq in 1996 because he feared persecution on the basis of his political opinion.

2. The second applicant is a citizen of the Philippines. The third applicant was born in Iraq and is an Iraqi citizen. The second and third applicants fled Iraq with the first applicant. They arrived in the Netherlands on 2 September 1996. The fourth applicant was born in the Netherlands and is registered in the Netherlands as a citizen of Iraq. The fifth and sixth applicants were born in the Netherlands and are registered in the Netherlands as stateless.

3. The first and second applicants were granted temporary protection in the Netherlands on 1 July 2005. The third, fourth and fifth applicants were granted temporary residence in the Netherlands on 1 July 2005. The sixth applicant was granted temporary residence in the Netherlands on 16 March 2006.

4. The applicants were issued with international travel documents by the authorities in the Netherlands on 23 March 2006. The documents are valid until 23 March 2009 and entitle the applicants to return to the Netherlands at any time up to 23 March 2009. The applicants were given tourist visas to enter Australia. They arrived in Australia, using their international travel documents, on 28 August 2006.

5. The applicants lodged protection visa applications in Australia on 22 September 2006. The grounds were that the first applicant had a well founded fear of persecution in Iraq and did not have a right to enter and reside in a third country, namely, the Netherlands, because he departed that country on 27 August 2006 without permission. Additionally, the first applicant claimed that he feared persecution in the Netherlands and feared that he would be *refouled* to Iraq if he returned to the Netherlands.

6. On 26 February 2007, the first respondent's department received advice from the Immigration and Naturalisation Service in the Netherlands that the applicants held temporary residence visas in the Netherlands which were valid until 1 July 2010. The delegate refused the protection visa applications on the basis that the applicants had a right to enter and reside in a third country, namely, the Netherlands,

and did not have a well founded fear of persecution in the Netherlands for a Convention reason.

7. The applicants sought review by the Tribunal. The Tribunal affirmed the delegate's decision. It found that the applicants had the right to reside in the Netherlands under their temporary residence visas until 1 July 2010. The Tribunal considered that the applicants were not entitled to protection visas in Australia by virtue of s.36(3) of the *Migration Act 1958* ("the Act"). The Tribunal found that the applicants did not face a well founded fear of persecution in the Netherlands. The Tribunal also found that the applicants did not have a well founded fear of *refoulement* to Iraq.

Grounds of review

8. At the hearing, the applicants relied on ground 1.a in the amended application filed on 21 December 2007, formally abandoned grounds 1.b and 1.c, placed only formal reliance on ground 2 and relied on ground 3. The remaining grounds give rise to the following issues:

   a) whether there was no evidence to support a finding critical to the ultimate decision, namely, that a local municipality was not empowered under Dutch law to withdraw a right to reside in the Netherlands;

   b) whether the Tribunal failed to comply with s.424A of the Act by failing to give particulars of information that was part of the reason for affirming the decision under review to all of the applicants, and only giving it to the first applicant with a request to advise the other applicants of the particulars of the information; and

   c) whether the reconstituted Tribunal made a jurisdictional error by adopting in a wholesale manner the findings of the Tribunal as previously constituted.

The no evidence ground

9. The applicants claimed and the Tribunal accepted that their names had been removed from the municipal register of Borsele in the

Netherlands after they travelled to Australia. The applicants then claimed that the removal of their names from the municipal register meant that their right to enter and reside in the Netherlands had been revoked or cancelled.

10. Documents before the Tribunal showed that:

a) the applicants held travel documents issued in March 2006 that gave them the right to re-enter the Netherlands at any time prior to March 2009;

b) information was received by the Department on 26 February 2007 from the Immigration and Naturalisation Service in the Netherlands that the applicants held temporary residence visas in the Netherlands which were valid until 1 July 2010; and

c) the applicants had been registered in the municipality of Borsele between 16 November 2005 and 20 March 2007.

11. In the light of this information, the Tribunal said as follows, at page 21 of its reasons for decision:

> *The Tribunal rejects the review applicant's claim that the municipality of Borsele was empowered under the Convention or under Dutch law to withdraw, revoke, cancel or otherwise determine his and the secondary review applicants' right to enter and reside in the Netherlands.*
>
> …
>
> *The Tribunal … finds that the review applicant and the secondary review applicants have a right to enter the Netherlands as the holders of valid travel documents at any time up to the expiry of those documents in February 2009. The Tribunal also finds that at the time of decision the review applicant and the secondary review applicants continue to hold the right to reside in the Netherlands until the expiry of their asylum residence visas in 2010.*

12. The applicants argued that the Tribunal found without any evidentiary basis that the municipality was not empowered under the Convention or under Dutch law to withdraw, revoke, cancel or otherwise determine the applicants' right to enter and reside in the Netherlands. The applicants argued that the Tribunal had no material on which it could

reach such a conclusion. They argued that it was just as likely that there was some nexus between registration in a municipality and the right to live in the country.

13. However, the Tribunal did not actually find that the municipality was not empowered to withdraw, revoke, cancel or otherwise determine the applicants' right to enter and reside in the Netherlands. Rather, the Tribunal rejected a claim to that effect. The Tribunal is entitled to reject a claim without contradictory evidence. The Tribunal is not required to determine claims on the basis of any particular standard of proof. However, the Tribunal should not accept a claim in the absence of a positive finding of satisfaction: for example, *SZEOO v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1797 at [37].

14. It is by no means self-evident that cancellation of municipal registration would have any impact on a right to enter and reside in a country. In fact, it seems far more likely that the opposite is the case. The applicants produced no independent evidence in support of their claim about the effect of the cancellation of their registration in the municipality of Borsele. Instead, they relied on their own bare assertion. In such circumstances, it was open to the Tribunal to not be satisfied of the claim made by the applicants.

15. The Tribunal went on to make findings that the applicants had a right to reside in the Netherlands until 2010. There was clear evidence to that effect in the form of documents from the Immigration and Naturalisation Service in the Netherlands. Accordingly, there was evidence before the Tribunal to support its finding.

16. The applicants relied on the decision in *QAAA of 2004 v Minister for Immigration and Multicultural Indigenous Affairs* (2007) 98 ALD 695, [2007] FCA 1918. However, in that case the Tribunal expressly stated that it made certain findings. Those findings were apparently made without evidence. The present case is different. The Tribunal rejected the relevant claim, which it was entitled to do, and had evidence to support its findings.

17. Accordingly, it cannot be said that there was no evidence to support the relevant findings. Ground 1 must be rejected.

The s.424A ground

18. The substratum of this ground was that the Tribunal sent invitations under s.424A of the Act to the first applicant only rather than to all of the applicants. At the hearing, the applicants stated that they formally relied on the ground but conceded the weight of the conclusions reached by Smith FM in *SZKDB v Minister for Immigration and Another* [2007] FMCA 1036.

19. In the present matter, the first applicant had signed an undertaking that he would inform each of the other applicants of the contents of any communication received by him from the Tribunal and reply to the Tribunal on behalf of all of the applicants. The other applicants had expressly authorised the Tribunal to communicate on their behalves with the first applicant. The s.424A letters themselves contained an express request for the first applicant to advise the other applicants about the Tribunal's invitation and stated that any response received from the first applicant would be regarded as a joint response unless stated to the contrary.

20. In these circumstances, and in keeping with the decision in *SZKDB*, I conclude that the alleged breach of s.424A of the Act is not made out.

The adoption of the previous Tribunal's findings

21. The factual underpinning of this ground is that the Tribunal prepared a decision but did not hand it down. As a result, that decision is best described as a draft decision. The member who had constituted the Tribunal ceased to be a member of the Tribunal. The Tribunal was reconstituted with another member who handed down the decision under review. That decision included verbatim large tracts of the draft decision. The draft decision was provided to the applicants under the *Freedom of Information Act 1982*.

22. The applicants provided to the court a supplementary court book which demonstrated the extensive similarities between the draft decision and the decision of the reconstituted Tribunal. The section headed "Application for Review" was identical, except for the addition of the words, in the decision of the reconstituted Tribunal:

NB: Please note that the primary review applicant will, for ease of reference, be referred to from hereon is simply as "the review applicant".

23. The section headed "Evidence" in the decision of the reconstituted Tribunal was identical to that section in the draft decision for about six pages. Then, the reconstituted Tribunal added the contents of a letter sent to the applicants under s.424A of the Act by the Tribunal as first constituted. The next two paragraphs in the decision of the reconstituted Tribunal were identical to the next two paragraphs in the draft decision. The reconstituted Tribunal then set out the contents of another letter sent under s.424A of the Act by the Tribunal as first constituted. The next page or so of the decision of the reconstituted Tribunal was identical to the draft decision.

24. The decision of the reconstituted Tribunal then contained about two pages of additional material. It concerned a letter sent by the reconstituted Tribunal to the applicants under s.424A of the Act. The additional material consisted of an introduction, the contents of the s.424A letter, the fact that there was no response, the fact that the applicants were invited to attend a further hearing and a summary of the evidence given at the further hearing.

25. The decision of the reconstituted Tribunal then contained about four pages under the heading, "Relevant Law" that was identical to the equivalent section in the draft decision. Under the heading, "Country Information" the reconstituted Tribunal included a paragraph taken from the draft decision which concerned information obtained by the Department in March 2007. The decision of the reconstituted Tribunal then contained about two pages of additional country information.

26. The section of the decision of the reconstituted Tribunal headed, "Findings and Reasons" occupies about six pages. About 85% of those pages are identical to the equivalent section in the draft decision. The identical parts include the whole of the subsections headed, "Nationality", "Well founded fear of persecution in Iraq", "Right to enter and reside in a third country", "Well founded fear of refoulement from third country", "Conclusions" and "Decision".

27. The only section of the "Findings and Reasons" part of the decision of the reconstituted Tribunal that is in any way different from the equivalent part of the draft decision is the section headed, "Well founded fear of persecution in the third country". About 20% of that section of the decision of the reconstituted Tribunal consists of new words and includes one finding that differed from the findings in the draft decision. The new words constitute two full paragraphs, two half paragraphs and eight additions to sentences.

28. In the draft decision, the teasing and minor altercations experienced at school by the child applicants were said to not amount to serious harm or systematic and discriminatory conduct. The reconstituted Tribunal, in one of the additional full paragraphs, accepted that the teasing and minor altercations, as well as systematic deprivation of housing and other amenities, could amount to serious harm constituting persecution. However, the reconstituted Tribunal considered that the Netherlands would provide adequate protection to the applicants.

29. The other full paragraph in the decision of the reconstituted Tribunal also concerned adequate state protection being available to the applicants in the Netherlands and included some country information sourced and reproduced by the reconstituted Tribunal.

30. One of the additional half paragraphs in the decision of the reconstituted Tribunal noted that family support was available to the applicants in Australia but noted that the Convention does not allow asylum seekers to decline refuge in a country because of personal preferences.

31. The second additional half paragraph in the decision of the reconstituted Tribunal noted that the testimony about the identity of those involved in certain attacks indicated that the applicants were uncertain of the perpetrators' identities. It also noted that the attacks were not state sanctioned given that the authorities assisted the applicants to relocate to a safer area. The additions made by the reconstituted Tribunal to eight sentences added clarity but did not add any substance.

32. In these circumstances, the applicants argued that the reconstituted Tribunal had misunderstood its task or failed to turn its mind to its task.

The applicants relied on the decision of *Aung v Minister for Immigration and Multicultural Affairs* [2000] FCA 1562 at [7] where Katz J said that:

> *the RRT would err if, in its review of the delegate's decision in a particular case, it gave weight to the delegate's decision in arriving at its own decision. It further follows, in my view, that the RRT would err if, in its review of the delegate's decision in a particular case, it found a certain fact to exist because the delegate had earlier done so. In either event, the RRT would be said to have committed an error of law ….*

The error in *Aung* was said to be either taking into account an irrelevant consideration or misconstruing s.415 of the Act.

33. The first respondent submitted that *Aung* was distinguishable because it concerned giving weight to the delegate's decision and making findings because the delegate had done so. The present case is different, in the first respondent's submission, because it concerns the reconstituted Tribunal adopting the findings of the Tribunal as first constituted.

34. I accept that submission. It is obvious that the Tribunal when reviewing a decision of a delegate would not properly fulfil its task if it simply accepted the delegate's findings or gave them weight. The reconstituted Tribunal does not review the decision of the Tribunal as first constituted. Rather, the reconstituted Tribunal completes the task of the Tribunal as first constituted. Section 422 of the Act expressly authorises the reconstituted Tribunal to "continue to finish the review".

35. The applicants also relied on the decision of Hill J in *NAQZ of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 200 ALR 662 at [89] which states as follows:

> *The appellants' last submission was that the tribunal committed a jurisdictional error when it failed to take into account relevant information, namely the decision of a previous tribunal and of a minister's delegate that the male appellant was a citizen of Bangladesh (rather than India). With respect to the appellants' submission, the tribunal function is to provide applicants for protection visas with de novo review of an unfavourable decision of the minister's delegate. The tribunal is therefore not required to take into account factual findings by a previous tribunal or by the minister's delegate. In fact overt reliance on such previous*

findings of fact by the deciding tribunal may very well amount to taking it taking irrelevant considerations into account: NANX v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 734; BC200303854 per Gyles J; Collins v Minister for Immigration (1981) 36 ALR 598 at 602 ; 58 FLR 407 at 411–12 ; 4 ALD 198 at 201–2 per Fox, Deane and Morling JJ; Aung v Minister for Immigration and Multicultural Affairs [2000] FCA 1562; BC200006624 at [4]–[7] per Katz J. The appellants have therefore failed to make out this ground of appeal.

36. However, that case is distinguishable. It concerns a completed review by an earlier Tribunal rather than an incomplete review as occurred in the present case. The distinction is made clear by the decision of the Full Court of the Federal Court in *Liu v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 541 at [38] to [40]:

> *On the contrary, what is provided in s 422 is suggestive against the right to a second invitation asserted by the appellants. The Parliament has expressed the reconstituted Tribunal's obligation as being "to continue to finish" the review. The ordinary meaning of those words does not suggest that the Tribunal is required to repeat steps of the review process. To "finish" means (Shorter Oxford English Dictionary):*
>
> > *"to bring to an end, to go through the last stage of ... to bring to completion, to complete ... to deal with or dispose of the whole or the remainder of ... to perfect finally or in detail."*
>
> *[39] To "continue" means (Shorter Oxford English Dictionary): "to carry on, keep up, persist in ... to keep on, retain ... to take up (a narrative, etc); to carry on in space, succession or development."*
>
> *[40] The phrase "continue to finish" simply requires the reconstituted Tribunal to undertake what remains to be done in the review without interrupting the process, while picking up and carrying on the steps that have already been taken.*

37. The applicants also relied on the decision in *Haluba v Minister for Immigration and Ethnic Affairs* (1995) 59 FCR 518 at 529. In that case, Beazley J said that:

> *Procedural fairness requires a decision-maker to apply an independent mind to the application subject of administrative action. … A decision maker may have regard to and adopt, if*

> *thought appropriate, the reasoning of some other person involved in the administrative process. Thus a decision-maker could accept the reasoning of an officer whose function it had been to provide a recommendation and could adopt verbatim, such report or recommendation, provided at all times that the decision was the independent decision of the decision maker. This case is different. The second decision-maker's task was to make a new determination.*

38. That passage does not assist the applicants. It was not the task of the reconstituted Tribunal to make a new determination. It was the task of the reconstituted Tribunal to finish the determination begun by the Tribunal as first constituted. In any event, Beazley J made it clear that it is not an error to adopt verbatim the reasoning of another, provided that an independent mind is brought to the process.

39. In my view, the reconstituted Tribunal did bring an independent mind to the review. That is demonstrated by the facts that the reconstituted Tribunal:

    a) sent a further s.424A letter;

    b) conducted a further hearing;

    c) cited extensive additional country information;

    d) incorporated the further material in its reasons for decision;

    e) made one finding that was completely different to the finding on the same matter made by the Tribunal as first constituted; and

    f) clarified and improved upon eight sentences taken from the draft decision.

40. These matters indicate that the reconstituted Tribunal looked carefully at the draft decision, accepted most of it, but considered that further information and a further hearing were required, and considered that the draft decision on one point was wrong. This, in my view, indicates that the reconstituted Tribunal brought an independent mind to the review.

41. Having brought an independent mind to the review, it was sensible and practical for the reconstituted Tribunal to utilise the bulk of the

wording of the draft decision. The alternative would have required the reconstituted Tribunal to rewrite about 20 pages of a draft decision with which it entirely agreed, as well as adding certain paragraphs and words by way of improvement. The alternative would not have produced a review that was economical and quick, as required by the Act.

42. Moreover, s.422 of the Act expressly authorises the Tribunal to have regard to "any record of the proceedings of the review made by the Tribunal as previously constituted". I accept the first respondent's submission that the "record" includes a draft decision. Accordingly, ground 3 is not made out.

Conclusion

43. As none of the grounds of review has been made out, the application must be dismissed with costs.

And I certify that the preceding forty-three (43) paragraphs are a true copy of the reasons for judgment of Riley FM

Associate: Catherine Wilson

Date: 3 April 2008